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SHDKT PROCEEDINGS AND ORDERS DATE: [03/29/96]

CASE NBR: [95101025] CFX STATUS: [DECIDED]
SHORT TITLE: [Dalton, Thomas, et al.]
VERSUS [Little Rock Family Planning] DATE DOCKETED: [122795]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Dec 21 1995	G	Petition for writ of certiorari filed. (Response due January 26, 1996)
2	Jan 4 1996		Brief of respondents Little Rock Family Planning Serivces, et al. in opposition filed.
3	Jan 17 1996		DISTRIBUTED. February 16, 1996 (Page 10)
5	Feb 20 1996		REDISTRIBUTED. February 23, 1996 (Page 15)
7	Feb 26 1996		REDISTRIBUTED. March 1, 1996 (Page 14)
9	Mar 11 1996		REDISTRIBUTED. March 15, 1996 (Page 21)
10	Mar 18 1996		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THOMAS DALTON, Director of the Arkansas Department of Human Services, in his official capacity; KENNY WHITLOCK, Deputy Director of the Arkansas Division of Economic and Medical Services, in his official capacity; JIM GUY TUCKER, Governor of the State of Arkansas, in his official capacity, and their successors, *Petitioners,*

vs.

LITTLE ROCK FAMILY PLANNING SERVICES, P.A.; CURTIS E. STOVER, M.D.; FAYETTEVILLE WOMEN'S CLINIC; TOM TVEDTEN, M.D., on behalf of themselves and the Medicaid-eligible women of the State of Arkansas to whom they provide health care, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A STATE PARTICIPATING IN MEDICAID MUST PAY FOR EVERY ABORTION FOR WHICH FEDERAL MATCHING FUNDS ARE AVAILABLE, CONTRARY TO THAT STATE'S CONSTITUTION.

II.

WHETHER THE EIGHTH CIRCUIT ERRED BY AFFIRMING THE SCOPE OF THE DISTRICT COURT'S INJUNCTION AND DECLARATION THAT AMENDMENT 68 TO THE ARKANSAS CONSTITUTION IS PREEMPTED BY FEDERAL LAW AND IS NULL, VOID AND OF NO EFFECT.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE

TABLE OF AUTHORITIES

CASES — PAGE

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES

IN THE

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No. 95-_____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Director of the Arkansas Department of Human Services, the Deputy Director of the Arkansas Division of Economic and Medical Services, and the Governor of the State of Arkansas respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the case at hand.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. B) is reported at 60 F.3d 497 (8th Cir. 1995). The memorandum opinion of the United States District Court for the Eastern District of Arkansas (Pet. App. C) is reported at 860 F.Supp. 609 (E.D. Ark. 1994). The Order of the United States District Court for the Eastern District of Arkansas (Pet. App. D) denying a stay and declaring the Arkansas Constitutional Amendment 68 null, void and of no effect has not been published.

JURISDICTION

Petitioners depend upon 28 U.S.C. §1254(1) (1988) to invoke the jurisdiction of this Court. The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on July 21, 1995, and a timely petition for rehearing was denied on September 22, 1995. (Pet. App. A.)

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The full text of Amendment 68 to the Arkansas Constitution is as follows:

Amend. 68. Abortion.

§1. Public Funding.
No public funds will be used to pay for any abortion, except to save the mother's life.

§2. Public Policy.
The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.

§3. Effect of Amendment.
This amendment will not affect contraceptives or require an appropriation of public funds.

The pertinent text of the "Hyde Amendment," section 509 of the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, 107 Stat. 1082, 113 (1993) provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. §1396a(a) (17) (A) states in relevant part:

> A State plan for medical assistance must . . .
>
> (17) [i]nclude reasonable standards . . . for determining . . . the extent of medical assistance which
>
> (A) are consistent with the objective of this subchapter. . . .

42 C.F.R. §441.202 provides:

> FFP [Federal Financial Participation] is not available in expenditures for an abortion unless the conditions specified in §§441.203 and 441.206 are met.

42 C.F.R. §441.203 provides, in relevant part:

> FFP is available in expenditures for an abortion when a physician has found, and certified in writing to the Medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered

if the fetus were carried to term.

42 C.F.R. §440.230(c) provides in pertinent part:

The Medicaid agency may not arbitrarily deny or reduce the amount, duration or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.

STATEMENT OF THE CASE

The facts material to the question presented in the case at hand stem from the Arkansas Constitution, Amendment 68 which forbids public funding for any abortion, except to save the mother's life and Congress' adoption of certain language contrary thereto in the 1993 appropriations rider to Title XIX of the Social Security Act, whose popular title is the 1994 Hyde Amendment.

State law. Since adoption of Amendment 68 in 1988, Arkansas has, as noted, chosen to limit public funding to abortions which save the life of the mother. This state limitation was consistent with the Hyde Amendment at the time of the adoption of the state constitutional amendment.

Medicaid. Title XIX of the Social Security Act, 42 U.S.C. §§1396, et seq. allows for the federal-state partnership, popularly known as "Medicaid" for the provision of medical services to the states' poor, disabled and otherwise needy population. The petitioners are the state officials whose duties require both that they administer the Medicaid program in Arkansas and adhere to the Arkansas Constitution.

Participation in Medicaid, while deemed voluntary, is conditioned upon state submission and federal approval of a plan delineating the terms and conditions of covered medical services. The requirements set forth in 42 U.S.C. §§1396-1396v and 42 C.F.R. §§430-456 govern the state plan. Nonetheless, states are allowed some leeway or discretion to tailor their state plans to their particularized program needs because the plans are measured by "reasonable standards . . . for determining . . . the extent of medical assistance which . . . are consistent with the objectives of" Title XIX. Arkansas is a longtime Medicaid participant.

Federal Law affecting Medicaid funding of abortions.

The Hyde Amendment

At Medicaid's inception in 1965, abortion was not a legal procedure in most states. This Court's 1973 decision in *Roe v. Wade*, 410 U.S. 113 (1973), however, had the effect of decriminalizing the procedure. Subsequently, in 1976 and every year thereafter to present, Congress adopted the Hyde Amendment, an appropriation bill rider which has contained various limitations on those abortions for which federal Medicaid funds may be expended.

During the decade from 1982 through 1992, the Hyde Amendment forbade the use of federal funds for abortion "except where the life of the mother would be endangered if the fetus were carried to term." *See* P.L. No. 101-166, §204, 103. Stat. 1159, 1177 (1989). This Court has held that states participating in Medicaid are not required by Title XIX to pay for abortions for which federal matching funds were unavailable. *See Harris v. McRae*, 448 U.S. 297 (1980).

For the first time in a decade, while Title XIX was not itself amended, the 1994 Hyde Amendment expanded the availability of federal matching funds for abortions to include not only life-saving procedures, but also the termination of pregnancies resulting from rape and incest. Section 509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, 107 Stat. 1082, 1113.

Arkansas Law concerning Medicaid abortion funding.

Amendment 68, *infra*, does not allow public funding of any abortion, except where necessary to save a mother's life. Thus, Amendment 68 flatly forecloses the expenditure of state public funds for all other abortions, even if federal Medicaid matching funds are available.

Federal regulations governing medicaid funding for abortions. The Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services (HHS) is the federal administrator of the Medicaid program. Regulations were promulgated by HHS in 1987 which restrict the use of federal funds to those abortions that are necessary to save the life of the mother. 42 C.F.R. §§441.200 to .208. The regulations are in force today. Contrary to the regulations, HCFA notified state Medicaid directors in December, 1993 that states would be required to use state Medicaid funds for abortions terminating pregnancies that were the product of rape or incest.

United States District Court Proceedings. Respondents are Medicaid providers and physicians who perform abortions in the State of Arkansas. Almost immediately after passage of the 1994 Hyde Amendment, the respondents filed suit on November 8, 1993 in the United States District Court, Eastern District of Arkansas. Respondents contended that Amendment 68 was inconsistent with the 1994 Hyde Amendment and thus preempted by federal law under the supremacy clause of the United States Constitution. Art. VI, Cl.2. The predicates for federal jurisdiction and injunctive and declaratory relief were 28 U.S.C. §§ 1331, 2201, and 2202. Respondents moved for summary judgment, the parties agreed, and the district court found, that there were no genuine issues of material fact in dispute and granted judgment as a matter of law.

The district court opinion stands for the proposition that Title XIX and the Hyde Amendment establish the minimum circumstances in which a state's Medicaid program must cover abortions. The district court found that the Arkansas state Medicaid plan and Amendment 68 were inconsistent with the 1994 Hyde Amendment and, therefore, violative of the Supremacy Clause of the United States Constitution. The enforcement of Amendment 68, declared null, void and of no

effect, was enjoined in its entirety so long as Arkansas accepts Medicaid funding. Finally, the enforcement of the Arkansas Medicaid fund was enjoined as inconsistent with the Hyde Amendment.

Proceedings before the Eighth Circuit Court of Appeals. Petitioners timely appealed the district court holding to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals refused to depart from its own precedent, thus, the opinion holds that, under the 1994 Hyde Amendment, participating states may not refuse to provide funding for abortions certified as medically necessary for Medicaid-eligible women in cases in which the pregnancy is the result of rape or incest. In addition, the Court held that the district court did not err in invalidating the entire Arkansas state constitutional amendment after declining to rewrite the amendment to cure its invalidity. 60 F.3d 497 (8th Cir. 1995).

Notwithstanding that HCFA had not amended its regulations to conform with the 1994 Hyde Amendment, or that Title XIX had not itself been substantively amended, the Eighth Circuit clearly gave legal effect to the December, 1993 "advisement" of the federal government to the states that they would be required to use state matching funds for additional abortions as a result of rape or incest. Additionally, the Eighth Circuit let stand the permanent injunction of Amendment 68 in its entirety as null, void and of no effect.

REASONS FOR GRANTING THE WRIT

The case at hand involves an important and precise question of federal law which has not been, but should be, expressly addressed by this Court: that is, whether a participating state may, consistent with Title XIX, withhold funding for abortions certified as medically necessary for which federal reimbursement is available under the Hyde Amendment.

Furthermore, the Court of Appeals decision ignores a fundamental precept of the federal-state partnership envisioned under Title XIX and the Medicaid program — the States' entitlement to unambiguous notice of their obligations in return for acceptance of federal funds. As this Court held in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), [i]f Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."

In the case at hand, rules and regulations are in force and effect which interpret the versions of the Hyde Amendment which appropriate funds for abortions to save the life of the mother. HCFA, the agency entrusted with the administration and implementation of the Medicaid program has not yet seen fit to revise the rules and regulations with the passage of the 1994 Hyde Amendment so as to put the States on *any* notice or attach conditions of program requirements for abortions to terminate pregnancy on account of rape or incest — other than to advise the states that they must pay. The flat failure of the agency entrusted with program administration and implementation to delineate the parameters of participation cannot be deemed "unambiguous notice."

The Eighth Circuit adopted the approach taken by the district court however, which relied upon precedent from this

Court and caselaw in other circuits, thus sidestepping the issues of agency interpretation of law and any deference due thereto. Yet, this Court has left open a specific issue presented herein, that is, whether a participating state may, consistent with Title XIX, withhold funding for abortions certified as medically necessary for which federal reimbursement is available under the Hyde Amendment. *Williams v. Zbaraz*, 448 U.S. 358, 363 & n.5, 100 S.Ct. 2694, 2698 & n.5, 65 L.Ed.2d 831 (1980). *See* also *Harris v. McRae*, 448 U.S. 297 (1980). Moreover, the Eighth Circuit Court of Appeals itself acknowledged that this question had not been disposed of in *Harris v. McRae, supra*, yet the court found that the lack of resolution of the question worked in favor of the plaintiffs' position.

In addition, certiorari should be granted in order to correct the judicial overreaching by which the Eighth Circuit United States Court of Appeals let stand the decision of the district court striking Ark. Const. Amendment 68 in its entirety rather than limiting the scope of the federal injunction of state law.

ARGUMENT

I.

THIS COURT SHOULD DECIDE A PRECISE AND IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS BEEN LEFT OPEN BY THIS COURT.

Though this Court has left open the issue, the Eighth Circuit United States Court of Appeals has held that States must provide all medically necessary services for which federal funds are available under the Medicaid Act. The Medicaid Act does not itself prescribe such a result and this Court has never ruled to the contrary, but has left this issue open.

The Medicaid Act, enacted through Title XIX by Congress in 1965, sets the parameters of the federal-state partnership under which federal financial assistance is provided to States that choose to reimburse medical providers for certain costs of medical treatment for eligible, needy applicants. The "primary purpose" of the Medicaid Act (42 U.S.C. §1396, et seq.) is to "enable each State, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services." ***Beal v. Doe***, 432 U.S. 438 at 444 (1977). A condition precedent for federal funding under Title XIX is that a state plan must provide financial assistance to the "categorically needy" in seven categories of medical treatment, including physicians' services. 42 U.S.C. §§1396a(a)(10)(A), 1396(a)(1)-(5), (17), (21) (1994 Supp.).

The construct of this "cooperative federalism" (*See*, e.g., *King v. Smith*, 392 U.S. 309 [1968]) calls for participating States to pay for medical assistance delivered in accordance with the individual state Medicaid plans, and the States are then in turn reimbursed for those medical services by the federal government consistent with federal reimbursement formulae. Nothing within Title XIX however, requires

participating States to fund every procedure that may fall within the delineated categories of medical care. *Beal, supra,* at 444.

Title XIX governs the content of state Medicaid plans, requiring simply that "A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title]. 42 U.S.C. §1396a(a)(17) (1994 Supp.). "[T]his language confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be "reasonable" and "consistent with the objectives of the Act." *Beal, supra,* at 444.

Not only should medical assistance be reasonably and consistently provided under the auspices of Title XIX, but the assistance must be equitably distributed among the eligible beneficiaries as well. 42 U.S.C. §1396(a)(10)(B)(i) (1994 Supp.). *See also* 42 C.F.R. §440.240(b)(1) (Oct. 1, 1993 ed.).

The equity requirement is addressed in part by 42 C.F.R. §440.230(c) (Oct. 1, 1993) which forbids differential provision of services based arbitrarily on the diagnosis, type of illness, or condition. Notwithstanding this prohibition, "appropriate limits" may be placed on a service "based on such criteria as medical necessity . . ." 42 C.F.R. §440.230(d) (Oct. 1, 1993 ed.). Read together, Title XIX and the implementing regulations permit States to choose and limit the medical procedures that will be funded subject to reasonable standards and equitable distribution in furtherance of the objectives of Title XIX. *See D.R. v. Mitchell,* 456 F.Supp. 609 (D. Utah 1978), reversed on other grounds, 617 F.2d 203 (10th Cir. 1980). They do not unambiguously require that the States provide funding as part of this federal-state contract.[1]

[1]See, *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981).

Despite the foregoing analysis, if allowed to stand, the Eighth Circuit opinion compels States, willing or not, to pay out state funds for costs attendant to any medical service or procedure for which Congress provides federal funding. This is so whether such service or procedure is "reasonable" or consistent with the objectives of the Medicaid Act.

To buttress its holding, the Eighth Circuit cited other opinions from the various circuits interpreting the 1994 Hyde Amendment, opinions which rested on precedent pre-dating this Court's decision in *Harris v. McRae,* 448 U.S. 297 (1980). *See Hern v. Beye,* 57 F.3d 906 (10th Cir. 1995), *cert. denied,* ___ U.S. ___ (1995); *Hope Medical Group for Women v. Edwards,* 63 F.3rd 418 (5th Cir. 1995); *Hodgson v. Board of County Commissioners,* 614 F.2d 601 (8th Cir. 1980); *Zbaraz v. Quern,* 596 F.2d 196 (7th Cir. 1979), *cert. denied,* 448 U.S. 907 (1980); *Preterm, Inc. v. Dukakis,* 591 F.2d 121 (1st Cir. 1979), *cert. denied,* 441 U.S. 952; *Roe v. Casey,* 623 F.2d 829 (3rd Cir. 1980). Nonetheless, the respective decisions in *Zbaraz, supra, Hodgson, supra, Preterm, supra,* and *Roe, supra,* do not hold that all states must fund all "medically necessary" services for which federal funds are available. This question was, however, left open not only by this Court's decision in *Harris v. McRae, supra,* but also by the opinion in *Williams v. Zbaraz,* 448 U.S. 358 (1980). The question should be addressed and settled in favor of the States' ability to exercise discretion under their respective state plans.

II.

THE EIGHTH CIRCUIT ERRED BY AFFIRMING THE SCOPE OF THE DISTRICT COURT'S INJUNCTION AND DECLARATION THAT AMENDMENT 68 TO THE ARKANSAS CONSTITUTION IS PREEMPTED BY FEDERAL LAW, AND IS NULL, VOID AND OF NO EFFECT.

The Eighth Circuit erroneously affirmed the scope of the district court's declaration that Amendment 68 is unconstitutional in its entirety and the court's permanent injunction of the Amendment. While the respondents challenged Amendment 68 "as applied," the effect of the injunction as affirmed was to treat the challenge as facial.

Amendment 68 expresses the considered public policy of the voters of the State of Arkansas to protect potential life. Potential human life is a matter of legitimate state interest, as this Court has recognized. *See*, e.g., *Beal v. Doe, supra; Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). Despite the legitimate state interest though, the Eighth Circuit upheld the scope of the district court injunction and declaration that Amendment 68 must yield to federal law in its entirety and that Amendment 68 was "null, void, and of no effect."

This judicial overreaching flies in the face of the rule that a federal court should not extend its invalidation of a [state constitutional provision] "further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). *See also Ada v. Guam Soc'y of Obstetricians and Gynecologists*, ___ U.S. ___ (1992) (Scalia, J., dissenting from denial of *certiorari*). "[P]artial, rather than facial invalidation is the required course," [*Little Rock Family Planning Services v. Dalton*, 60 F.3rd 497, 505 (1995) (Bowman, dissenting)], thus, the Eighth Circuit erred by

summarily affirming the scope of the district court's declaration and injunction. This judicial overreaching should be addressed and corrected on appeal by this Court.

CONCLUSION

For the foregoing reasons and citations to authority, the petition for writ of certiorari should be granted.

Respectfully submitted this 21st day of December, 1995.

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 94-2885EALR

Little Rock Family Planning Services, P.A., et al,	★	
Appellees,	★	Appeal from the United States District Court for the
v.	★	Eastern District of Arkansas
Thomas Dalton, et al,	★	
Appellants.	★	

The petition for rehearing filed by the appellants has been considered by the court and is denied.

September 22, 1995

Order Entered at the Direction of the Court.

/s/ Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 94-2885, 94-3903

LITTLE ROCK FAMILY PLANNING SERVICES, P.A.; Curtis E. Stover, M.D.; Fayetteville Women's Clinic; Tom Tvedten, M.D., on behalf of themselves and the Medicaid-eligible women of the State of Arkansas to whom they provide health care, *Appellees,*

v.

Thomas DALTON, Director of the Arkansas Department of Human Services, in his official capacity; Kenny Whitlock, Deputy Director of the Arkansas Division of Economic and Medical Services, in his official capacity; Jim Guy Tucker, Governor of the State of Arkansas, in his official capacity, and their successors, *Appellants.*

G. William ORR, M.D., on behalf of himself and the Medicaid-eligible women seeking abortions he serves; Womens Services, P.C., *Appellees,*

v.

E. Benjamin NELSON, in his official capacity as Governor of the State of Nebraska; Donald Stenberg, in his official capacity as Attorney General of the State of Nebraska; Mary Dean Harvey, in her official capacity as Director of the Nebraska Department of Social Services, *Appellants.*

These cases were consolidated for purposes of appeal.

In appeal No. 94-2885EA, Arkansas state officials (the Arkansas defendants) appeal from a final judgment entered in the United States District Court[1] for the Eastern District of Arkansas holding that an amendment to the Arkansas state constitution providing that no public funds will be used to pay for abortions except to save the life of the mother violated the 1994 Hyde Amendment and enjoining its enforcement. *Little Rock Family Planning Services v. Dalton*, 860 F.Supp. 609 (E.D. Ark. 1994) (*Dalton*). In appeal No. 94-3903NE, Nebraska state officials (the Nebraska defendants) appeal from a final judgment entered in the United States District Court[2] for the District of Nebraska holding that a Nebraska state regulation providing that no state funds will be used to pay for abortions except to save the life of the mother violated the 1994 Hyde Amendment and enjoining its enforcement. *Orr v. Nelson*, No. 4:CV94-3252 (D.Neb. Nov. 4, 1994) (*Orr*). For reversal the Nebraska defendants argue the plaintiffs' supremacy clause claim is not enforceable under 42 U.S.C. § 1983 and therefore the district court did not have subject matter jurisdiction. The Nebraska and Arkansas defendants argue on the merits that the Nebraska state regulation and the Arkansas state constitutional amendment do not violate the 1994 Hyde Amendment. For the reasons discussed below, we affirm both judgments.

BACKGROUND FACTS

There are no material facts in dispute in either case. The following statement of background facts about the Medicaid program and the Hyde Amendments is taken in large part from the *Dalton* memorandum opinion.

Medicaid is a jointly funded, federal-state program designed to provide medical assistance to the poor. 42 U.S.C. §§ 1396-1396v (Title XIX of the Social Security Act of 1965). Although a state's participation in the Medicaid program is

[1]The Honorable William R. Wilson, Jr., United States District Judge for the Eastern District of Arkansas.

[2]The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

voluntary, "[o]nce a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations." *Alexander v. Choate*, 469 U.S. 287, 289 n. 1, 105 S.Ct. 712, 714 n. 1, 83 L.Ed.2d 661 (1985). "States choosing to participate in the Medicaid program may elect to provide medical services either to the 'categorically needy' only, or to both the 'categorically needy' and the 'medically needy.' " *Dalton*, 860 F.Supp. at 615. "The 'categorically needy' are those who receive financial aid from certain specified federal aid programs; the 'medically needy' are those who do not qualify for some forms of federal assistance but who nonetheless lack the resources to obtain adequte medical care." *Id.* Arkansas and Nebraska provide services to both the categorically needy and the medically needy.

"Participating states must adopt a Medicaid plan explaining the state's eligibility requirements and the services that will be funded; the state plan must gain approval from the federal government." *Id.* Certain categories of medical care must be provided by every state Medicaid program; other categories are optional. Mandatory categories of medical care include inpatient hospital services, outpatient hospital services, other laboratory and x-ray services, skilled nursing facilities, "early and periodic screening, diagnostic and treatment" services for persons under the age of 21, family planning services and supplies, and physicians' services. 42 U.S.C. § 1396d(a). "Abortion falls within several of the mandatory categories, including family planning services, physicians' services, outpatient hospital services, and inpatient hospital services." *Dalton*, 860 F.Supp. at 616. The state plan must cover medical services that a person's physician certifies are "medically necessary." *Id.* The Medicaid statute does not refer expressly to abortion; however, the Medicaid statute "does not identify *any* specific medical procedures, whether they are cesarean sections, transfusions, bypass surgery, or abortions." *Id.* "Because abortion falls within several of these mandated categories [of medical service], a medically necessary abortion is a mandatory covered service." *Id.*

Between 1973 and 1976 Medicaid covered medically necessary abortions. However, in 1976, Congress enacted the Hyde Amendment "prohibit[ing] *federal* reimbursements for abortions except for the categories that Congress declared medically necessary, which at that time included only cases where the 'life of the mother would be endangered if the fetus were carried to term.' " *Id.* at 617 (citation omitted) (emphasis added). "The [Hyde] Amendment does not restrict participating states' use of *state* funds to provide abortions through Medicaid or any other state program, as the states remain free to fund more abortions than those for which federal funds were made available under the Hyde Amendment." *Id.* (citation and footnote omitted) (emphasis added). "A subsequent version of the [Hyde] Amendment expanded the [federal] funding to include victims of rape or incest and 'instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.' " *Id.* (citation omitted). "The fiscal year 1980 Hyde Amendment deleted the category regarding 'physical health damage' but still included the category for victims of rape or incest." *Id.* However, "[f]rom fiscal years 1982 to 1993 the Hyde Amendment limited medically necessary and thus federally funded abortions to cases where the mother's life was in danger." *Id.*

Then, in late 1993, Congress expanded the Hyde Amendment to include federal funding for abortions in cases of rape or incest as well as to save the life of the mother. The fiscal year 1994 Hyde Amendment provides that "[n]one of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest." The Departments of Labor, Health & Human Services, & Education, & Related Agencies Appropriations Act of 1994, § 509, Pub.L. No. 103-112, 107 Stat. 1082, 1113 (1993). In December 1993 the federal government advised state Medicaid directors that, effective October 1, 1993, state Medicaid plans must cover

abortions for victims of rape or incest in addition to abortions necessary to save the life of the mother. Since at least 1982, pursuant to a state regulation, the Nebraska Medicaid plan has covered "abortions only when the life of the mother would be endangered if the fetus were carried to term." Neb. Dep't Pub. Welfare Prog. Manual § 18-004.08. In 1988 the people of the state of Arkansas amended the state constitution to restrict state funding of abortions. Amendment 68 provides in part that "[n]o public funds will be used to pay for any abortion, except to save the mother's life." The Arkansas Medicaid plan reflects the state constitutional amendment. Arkansas and Nebraska each refused to amend or revise its state Medicaid plan to cover abortions for victims of rape or incest.

THE ARKANSAS CASE — *Little Rock Family Planning Service v. Dalton*

In the Arkansas case the plaintiffs are Little Rock Family Planning Services, a Medicaid provider, which operates a women's health care facility providing reproductive health care services, including abortions, to Medicaid-eligible women in Arkansas, its medical director, Dr. Curtis Stover, a licensed physician who provides medical services, including abortions, to Medicaid-eligible women, some of whom are pregnant as a result of rape or incest, and Fayetteville Women's Clinic and Dr. Tom Tvedten, who provide services similar to those provided by Little Rock Family Planning Services and Dr. Stover. Little Rock Family Planning Services and Dr. Stover sued on their own behalf and on behalf of the Medicaid-eligible women for whom they provide health care services. The defendants are Thomas Dalton, the director of the state department of human services, Kenny Whitlock, the deputy director of the division of the state department of human services that implements the state Medicaid program, and Jim Guy Tucker, the governor of the state of Arkansas, each sued in his official capacity.

The plaintiffs filed an action for declaratory and injunctive relief alleging that the state constitutional amendment

was inconsistent with the 1994 Hyde Amendment and thus preempted by federal law under the supremacy clause of the United States Constitution, art. vi, cl. 2. The plaintiffs filed a motion for summary judgment; the parties agreed, and the district court found, that there were no genuine issues of material fact in dispute. The district court, in an extensive memorandum opinion, found that there was an actual case or controversy, 860 F.Supp. at 614, the plaintiffs had standing to assert their rights and the rights of their patients, *id.*, the case was ripe for review, *id.* at 614-15, and, on the merits, that the state constitutional amendment was in conflict with federal Medicaid law, as amended by the 1994 Hyde Amendment, and thus invalid. *Id.* at 617-22. The district court relied upon four circuit court of appeals decisions which specifically held that federal Medicaid law requires states to fund abortions unless federal funding for those abortions is proscribed by the Hyde Amendment as long as the state participates in the Medicaid program. *Id.* at 618, *citing Roe v. Casey*, 623 F.2d 829, 831, 834 (3d Cir. 1980) (Pennsylvania law; Hyde Amendment in effect in 1980); *Hodgson v. Board of County Commissioners*, 614 F.2d 601, 611 (8th Cir. 1980) (*Hodgson*) (Minnesota law); *Zbaraz v. Quern*, 596 F.2d 196, 199 (7th Cir. 1979) (Illinois law), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126-27 (1st Cir.) (Massachusetts law), *cert. denied*, 441 U.S. 952, 99 S.Ct. 2181, 60 L.Ed.2d 1057 (1979). The district court also cited several other decisions from other jurisdictions which reached similar results in cases specifically involving the 1994 Hyde Amendment. 860 F.Supp. at 620 (listing cases); *see also Hope Medical Group for Women v. Edwards*, 860 F.Supp. 1149, 1152 (E.D.La. 1994) (Louisiana law barring public funds for abortion except to prevent the death of the mother inconsistent with 1994 Hyde Amendment), *stay pending appeal denied*, No. 94-30445 (5th Cir. Aug. 16, 1994), *stay denied*, ___ U.S. ___, 115 S.Ct. 1, 129 L.Ed.2d 903 (Scalia, Circuit Justice 1994).

The district court also decided that it could not rewrite the state constitutional amendment in order to preserve its constitutionality, 860 F.Supp. at 622-25, and that the state

constitutional amendment was not severable under state law. *Id.* at 625-28. The district court enjoined the enforcement of the state constitutional amendment, as well as the provisions of the state Medicaid plan related to abortion funding that are inconsistent with the Hyde Amendment, for so long as the state accepts federal Medicaid funds. This appeal followed.

THE NEBRASKA CASE — *Orr v. Nelson*

In the Nebraska case the plaintiffs are Womens Services PC, a Medicaid provider, and its president, Dr. G. William Orr, a licensed physician. Dr. Orr provides medical treatment, including abortions, to Medicaid-eligible women in Nebraska who are pregnant as a result of rape or incest. In July 1994 Dr. Orr submitted a Medicaid claim for an abortion for a woman whose pregnancy was the result of rape; the state department of social services denied the claim on the ground that Medicaid would not reimburse the claim. The defendants are E. Benjamin Nelson, the governor of the state of Nebraska, Donald Stenberg, the state attorney general, and Mary Dean Harvey, the director of the state department of social services, each sued in his or her official capacity. Like the plaintiffs in *Dalton*, the Nebraska plaintiffs filed an action for declaratory and injunctive relief, alleging that the state regulation providing that no state funds will be used to pay for abortions except to save the life of the mother was inconsistent with the 1994 Hyde Amendment and thus preempted by federal law. The plaintiffs filed a motion for summary judgment; the parties agreed, and the district court found, that there were no genuine issues of material fact in dispute. The district court granted the motion for summary judgment in favor of the plaintiffs, holding that the 1994 Hyde Amendment preempts conflicting state law, declared the state regulation was invalid, and permanently enjoined the defendants from enforcing the state regulation. *Orr*, slip op. at 6-8 (citing other Hyde Amendment decisions involving other states, including the *Dalton* case). This appeal followed.[3]

[3]Subsequently the district court awarded the plaintiffs attorney's fees and expenses under 42 U.S.C. § 1988 in the amount of $5,456.08. *Orr v. Nelson*, 874 F.Supp. 998 (D.Neb. 1995). The appeal of the award of attorney's fees and expenses, No. 95-1555, was argued before the same panel as the appeal on the merits.

SUMMARY JUDGMENT

We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *St. Paul Fire & Marine Insurance Co. v. FDIC*, 968 F.2d 695, 699 (8th Cir. 1992). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

42 U.S.C. § 1983 ENFORCEMENT

The Nebraska defendants first argue the plaintiffs' supremacy clause claim is not enforceable under 42 U.S.C. § 1983 and therefore the district court lacked subject matter jurisdiction. The Nebraska defendants argue that *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (*Golden State*), has been abrogated by the subsequent decision in *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (*Suter*). The Nebraska defendants also argue that, even if *Golden State* remains valid, the 1994 Hyde Amendment does not impose the "unambiguous mandatory obligation" required to create an enforceable federal right because the 1994 Hyde Amendment is an amendment to an appropriations act, which does not amend the Medicaid statute itself. The Nebraska defendants argue that the 1994 Hyde Amendment merely limits the use of federal funds to reimburse the states and does not impose an affirmative mandate on the states to expend state funds. The district court held that the plaintiffs' supremacy clause claim is enforceable under 42 U.S.C. § 1983. *Orr v. Nelson*, 874 F.Supp. 998, 1001-04 (D.Neb. 1995).

We agree with the district court. This court rejected the

abrogation argument in *Arkansas Medical Society v. Reynolds*, 6 F.3d 519 (8th Cir. 1993) (*Reynolds*). *Reynolds* concluded that "[f]irst, *Suter* did not create an analytical framework to replace *Golden State*. Second, *Suter* did not overrule *Wilder* [*v. Virginia Hospital Ass'n*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) (*Wilder*)]. Third, *Suter* placed great emphasis on the fact that rights must be 'unambiguously' conferred to be enforceable. And fourth, *Suter* emphasized that each statute must be examined on its own basis." 6 F.3d at 525; *see also Howe v. Ellenbecker*, 8 F.3d 1258, 1261-63 & n. 5 (8th Cir. 1993) (noting that although *Suter* may have weakened earlier precedents, Supreme Court did not overrule *Golden State* and *Wilder*, so the better approach is to use *Wilder* framework, as articulated in *Suter*), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1373, 128 L.Ed.2d 49 (1994). The first question, which is basically the first step of the *Golden State* test, has three subparts — first, whether the plaintiff is the intended beneficiary of the statute; second, whether "there is sufficient mandatory language in the statute to create a binding obligation on the state"; and third, "whether the statute's language is too vague and amorphous to enforce a right via § 1983." *Reynolds*, 6 F.3d at 525-27. The second question, which is basically the second step of the *Golden State* test, is whether Congress has foreclosed § 1983 enforcement. *Reynolds*, 6 F.3d at 528.

[1] Applying this hybrid test, we agree with the district court that the plaintiffs can enforce the Medicaid statute, as amended by the 1994 Hyde Amendment, through 42 U.S.C. § 1983. 874 F.Supp. at 1003-04. The plaintiffs in both these cases are Medicaid providers and Medicaid recipients; they are the intended beneficiaries of the 1994 Hyde Amendment because the amendment concerns, respectively, reimbursement and medical services. *Reynolds*, 6 F.3d at 526 (Medicaid providers and Medicaid recipients are intended beneficiaries of Medicaid provision). The 1994 Hyde Amendment contains sufficient mandatory language to impose a binding obligation on the states to fund certain abortions. Nor is the language of the Medicaid statute, as amended by the 1994 Hyde Amend-

ment, too vague or amorphous to enforce through 42 U.S.C. § 1983. As discussed below, since 1980, numerous judicial decisions have consistently construed the federal Medicaid statute to *require* participating states to fund medically necessary abortions unless proscribed by the Hyde Amendment. These decisions have also consistently construed the 1994 Hyde Amendment, and the virtually identical 1977 Hyde Amendment, to *require* participating states to fund abortions to save the life of the mother and in cases of rape or incest. Finally, Congress has not foreclosed 42 U.S.C. § 1983 enforcement in the Medicaid statute. *Wilder*, 496 U.S. at 520-23, 110 S.Ct. at 2523-24; *Reynolds*, 6 F.3d at 528.

MERITS

On the merits in each appeal the defendants argue the district court erred in holding the 1994 Hyde Amendment requires states to fund certain abortions under Medicaid. The Arkansas defendants argue the 1994 Hyde Amendment is an appropriations measure that merely prohibits the use of federal funds for certain medical services. They argue the Hyde Amendment did not substantively amend the Medicaid statute and that if Congress wanted to amend the Medicaid statute to require the states to fund certain abortions, then Congress would have done so. The Nebraska defendants also argue this circuit's Hyde Amendment decisions, *Hodgson* and *Reproductive Health Services v. Freeman*, 614 F.2d 585 (8th Cir.). (*Freeman*), *vacated on other grounds*, 449 U.S. 809, 101 S.Ct. 57, 66 L.Ed.2d 13 (1980), were incorrectly decided and urge the court to reconsider those precedents in light of *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

[2, 3] We must decline the defendants' invitation to overrule *Hodgson* and *Freeman*. "One panel of this Court is not at liberty to disregard a precedent handed down by another panel." *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir.), *cert. denied*, 484 U.S. 965, 108 S.Ct. 455, 98 L.Ed.2d 395 (1987).

In *Hodgson* this court rejected the defendants' arguments that the Hyde Amendment is merely an appropriations

measure that did not substantively amend the Medicaid statute. In *Hodgson* we held that the Hyde Amendment in effect at that time which, like the 1994 Hyde Amendment banned federal funding for abortions excet to save the life of the mother or in cases of rape or incest, "altered Title XIX's requirements, with the result that, as a statutory matter, [the state] need only finance those abortions contemplated by the Hyde Amendment." 614 F.2d at 605; *see also Freeman*, 614 F.2d at 591-92 (noting that *Hodgson* held that Hyde Amendment substantively amended the Medicaid statute). Contrary to the defendants' argument, in *Harris v. McRae* the Supreme Court expressly left the issue open. 448 U.S. at 312 n. 14, 100 S.Ct. at 2685 n. 14. Moreover, we agree with the Tenth Circuit that the Supreme Court's analysis in *Harris v. McRae* supports the plaintiffs' basic premise that "the Hyde Amendment does not affect states' underlying obligations imposed by Title XIX and federal Medicaid regulations" to fund abortions for which federal reimbursement is available. *Hern v. Beye*, 57 F.3d 906, 908-09 (10th Cir. 1995) (1994 Hyde Amendment) (Supreme Court in *Harris v. McRae* "construed the Hyde Amendment as indirectly modifying states' obligations under Title XIX").

As noted by the Tenth Circuit in *Hern v. Beye*, 57 F.3d at 909-13, every federal district court to consider the issue, *id.* at 912 (citing district court cases), has held, consistent with the analysis in *Hodgson* and the other circuit courts of appeals decisions, that the 1994 Hyde Amendment bars participating states from denying funding to Medicaid-eligible women for abortions in cases of rape or incest. *See also Edwards v. Hope Medical Group for Women*, ___ U.S. at ___, 115 S.Ct. at 2 (citing four circuit court decisions, including *Hodgson*, construing prior Hyde Amendment).

In addition, we note that this court in *Freeman* rejected the Nebraska defendants' argument based on *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977), that the Congress which enacted the Medicaid statute could not have intended to require states to fund abortions because at that time (1965) abortions except to save the life of the mother were

illegal in most states. 614 F.2d at 590-91 (refusing to read *Beal v. Doe* to permit a state to withhold funding for any service, no matter how medically necessary, that was not legally available in 1965).

[4] Finally, we hold in No. 94-2885EA that the district court did not err in invalidating the entire Arkansas state constitutional amendment and in declining to rewrite the amendment to cure the invalidity. Redrafting the amendment or writing in exceptions in order to cure the invalidity presented by the plain meaning of its language would have involved the district court in "positive legislative enactment clearly beyond its judicial role." *Valley Family Planning v. North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981). Further, the district court did not err in holding that sections 2 and 3 of Amendment 69 have no function independent of the first section and no practical working purposes. These two sections are mutually connected with and dependent on section 1 and would be without operative effect if allowed to stand by themselves. *Handy Dan Improvement Center, Inc. v. Adams*, 276 Ark. 268, 633 S.W.2d 699 (1982); *Allen v. Langston*, 216 Ark. 77, 224 S.W.2d 377 (1949).

In sum, we hold the Arkansas state constitutional amendment and the Nebraska state regulation prohibiting the use of public funds for abortions except to save the life of the mother violate the federal Medicaid statute, as amended by the 1994 Hyde Amendment, and are therefore invalid under the supremacy clause.

Accordingly, the judgments of the district courts are affirmed.

BOWMAN, Circuit Judge, concurring in part and dissenting in part.

The Supreme Court has held that Title XIX does not require states participating in the Medicaid program to fund abortions that are not certified by physicians as medically

necessary. *Beal v. Doe*, 432 U.S. 438, 447, 97 S.Ct. 2366, 2372, 53 L.Ed.2d 464 (1977). The Court also has held that Title XIX does not require participating states to pay for those abortions certified as medically necessary for which Congress, through the Hyde Amendment, has denied federal reimbursement. *Harris v. McRae*, 448 U.S. 297, 311, 100 S.Ct. 2671, 2685, 65 L.Ed.2d 784 (1980). It appears, however, that the Supreme Court has not expressly addressed the precise issue presented in the cases now before us, *i.e.*, whether a participating state may, consistent with Title XIX, withhold funding for abortions certified as medically necessary for which federal reimbursement is available under the Hyde Amendment. *See Williams v. Zbaraz*, 448 U.S. 358, 363 & n. 5, 10 S.Ct. 2694, 2698 & n. 5, 65 L.Ed.2d 831 (1980).

In *Beal*, the Supreme Court recognized that Title XIX gives each participating state "broad discretion," 432 U.S. at 444, 97 S.Ct. at 2370, to determine which medical procedures, among the vast array of those that physicians may certify as medically necessary, the state will fund. Here, the Arkansas and Nebraska defendants argue that this "broad discretion" extends to denying state funding for all abortions except those performed to save the life of the mother. Were we writing on a clean slate, I would be inclined to agree with the defendants that states participating in the Medicaid program are not required to fund abortions merely because Congress, by loosening the strictures of the Hyde Amendment against the expenditure of federal funds for abortions, has chosen to make federal reimbursement available. However, as Judge McMillian's opinion demonstrates, the existing federal decisions, including prior decisions of this Circuit by which the present panel is bound, are to the effect that a state's approach to the public funding of abortions through the Medicaid program cannot be more restrictive than the Hyde Amendment. *See, e.g., Hodgson v. Board of County Comm'rs*, 614 F.2d 601, 611-15 (8th Cir. 1980). Faithfulness to the law as it is, rather than as one might think it ought to be, requires us to reject defendants' position to the contrary. I therefore join the Court's opinion to the extent it holds that under the 1994 Hyde

Amendment participating states may not refuse to provide funding for abortions certified as medically necessary for Medicaid-eligible women in cases in which the pregnancy is the result of rape or incest.

I do not agree, however, that it was proper for the District Court to enjoin Amendment 68 of the Arkansas Constitution in its entirety.[1] The full text of Amendment 68 is as follows:

Amend. 68. Abortion.

§ 1. Public funding.

No public funds will be used to pay for any abortion, except to save the mother's life.

§ 2. Public policy.

The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.

§ 3. Effect of amendment.

This amendment will not affect contraceptives or require an appropriation of public funds.

Ark. Const. amend. 68. Neither section 2 nor section 3 would appear to be implicated by the District Court's Medicaid ruling that we here sustain, and section 1 is implicated only insofar as this ruling results in Arkansas's being required, in cases of rape or incest, to use public funds to pay for abortions that are not

[1]There is loose talk in the briefs of the parties about the District Court's having declared Amendment 68 null and void. What the court actually did, however, was to enjoin the enforcement of Amendment 68 "in its entirety for so long as the State of Arkansas accepts federal funds pursuant to the Medicaid Act." *Little Rock Family Planning Servs. v. Dalton*, 860 F.Supp. 609, 628 (E.D. Ark. 1994). In effect, the District Court has benched Amendment 68, but has not banished it from the game forever. Thus, should Congress again change the Hyde Amendment to its earlier formulation of no federal funds for abortions except to save the life of the mother, the injunction could be lifted, and Amendment 68 once again would be fully enforceable.

necessary for purposes of saving the mother's life. To that extent, Amendment 68 must yield to federal law, but the Supremacy Clause can be given its due by measures far less draconian and far less intrusive on the public policy of the state of Arkansas than the drastic remedy that has been imposed here. I believe the question is not, as the District Court thought, whether it had the authority to rewrite Amendment 68, but whether, in order for the federal interest to be fully served, it would be entirely sufficient simply to enjoin the defendants from relying on or enforcing section 1 in cases of meically necessary abortions for Medicaid-eligible women where pregnancy results from rape or incest. An order of this sort, tailored to fit the circumstances of the case, would uphold the supremacy of federal law in the somewhat narrow range of cases in which it trumps state law without running roughshod over the state interest, and would leave Amendment 68 available to be given effect in its many possible applications that are completely consistent with federal law.

As the plaintiffs themselves have emphasized (*see* Brief of Plaintiffs-Appellees at 39-40), what we have in this case is an "as applied" challenge to Amendment 68, not a facial challenge. "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v. Guam Soc'y of Obstetricians and Gynecologists*, ___ U.S. ___, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting from denial of *certiorari*). Justice Scalia's observation is solidly grounded in the Supreme Court's consistent practice, and applies with at least equal force when a provision of a state constitution is found invalid under the federal Constitution. Except for a limited category of First Amendment free-speech cases involving overbroad statutes, "the rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985). Like the Supreme Court in *Brockett*, I believe that "[t]he case before us [is] governed by the normal rule that partial, rather than facial, invalidation is the

required course." *Id.* at 504, 105 S.Ct. at 2802. The "normal rule" could easily be observed in this case by means of a limited injunction of the kind mentioned in the preceding paragraph. I therefore respectfully dissent from our Court's affirmance in No. 94-2885 of the District Court's order enjoining the enforcement of Amendment 68 in its entirety.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

July 25, 1994

LITTLE ROCK FAMILY PLANNING SERVICES, P.A.; Curtis E. Stover, M.D.; Fayetteville Women's Clinic; and Tom Tvedten, M.D., on behalf of themselves and the Medicaid-eligible women of the state of Arkansas to whom they provide health care, *Plaintiffs*

vs. No. LR-C-93-803

Thomas DALTON, Director of the Arkansas Department of Human Services, in his official capacity; Kenny Whitlock, Deputy Director of the Arkansas Division of Economic and Medical Services, in his official capacity, and Jim Guy Tucker, Governor of the State of Arkansas, in his official capacity,and their successors *Defendants*

MEMORANDUM OPINION AND ORDER

WILSON, District Judge.

Plaintiffs have filed a motion for summary judgment in a civil action for injunctive and declaratory relief under the Supremacy Clause of the United States Constitution, Article VI, Clause 2. Little Rock Family Planning Services and the other plaintiffs seek to have this Court declare invalid and enjoin enforcement of Amendment 68 to the Arkansas Constitution, alleging that it is in conflict with applicable federal law — the 1994 Hyde Amendment. Amendment 68 states that "No public funds will be used to pay for any abortion, except to save the mother's life." Under the Hyde Amendment that was signed into law on October 21, 1993, federal law requires Arkansas and other states that participate in the federal

Medicaid program to pay for abortions in cases where pregnancy is the result of rape or incest, as well as abortions to save the mother's life. Plaintiffs argue that Amendment 68 is inconsistent with the Hyde Amendment and is thus preempted by federal law and void. Plaintiffs are correct, and the motion for summary judgment will be granted, for the reasons discussed below.

SUMMARY JUDGMENT

[1] Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided solely on legal grounds. *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R.Civ.P. 56. The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is a need for trial — whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The Eighth Circuit has set out the burdens of the parties in connection with a summary judgment motion in *Counts v. MK-Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988):

> The burden on the party moving for summary judgment is only to demonstrate, i.e., 'to point out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden,

> summary judgment should be granted. *Id.* at 1339 (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-274 (8th Cir. 1988).

Rule 56(c) of the Federal Rules of Civil Procedure states that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court has emphasized that Rule 56 must be construed with due regard not only for the rights of people asserting claims and defenses "that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the rule, prior to trial, that the claims and defenses have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

PROCEDURAL AND FACTUAL BACKGROUND

The Court asked both parties if they desired a hearing on this matter — both responded that there are no material factual issues, and that there is no need for a hearing. The Court finds that there are no genuine issues of material fact. Since neither party requested oral arguments, the Court will decide the case based on the extensive discussion of the legal issues in the parties' pleadings and briefs.

Little Rock Family Planning Services is a provider under the Medicaid program and operates a women's health care facility providing reproductive health care services, including abortions, to Medicaid-eligible women in Arkansas. The state reimburses it for medical services, except for abortions that are not performed to save the mother's life. Some of the facility's patients are Medicaid-eligible women who seek to terminate

pregnancies that are the result of rape or incest.[1] The facility's Medical Director is plaintiff Curtis Stover, M.D., a licensed physician who provides medical services including abortions to Medicaid-eligible women, some of whom are pregnant as a result of rape or incest. Little Rock Family Planning Services and Dr. Stover sue on their own behalf and on behalf of the Medicaid-eligible women for whom they provide health care services. Plaintiffs Fayetteville Women's Clinic and Dr. Tom Tvedten, M.D., provide services similar to those provided by Little Rock Family Planning Services and Dr. Stover.

Defendant Thomas Dalton is Director of the Arkansas Department of Human Services (DHS), the agency that administers public assistance in Arkansas. Kenny Whitlock is Deputy Director of DHS for the Division of Economic and Medical Services, which implements the state medical assistance program. The Governor is a defendant in his official capacity in enforcing state law.

CASE OR CONTROVERSY REQUIREMENT

[2, 3] Defendants allege that the complaint does not meet the requirements of the Article III case or controversy requirement, arguing that plaintiffs lack standing, and also that the case is premature under the ripeness doctrine. Standing is a threshold issue in every case before a federal court, determining the power of the court to entertain the suit.

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[1]About 16,000 women in the United States become pregnant annually because of rape or incest. Regarding eligibility to receive Medicaid benefits for all purposes, there were about 35,700 women in Arkansas in 1985 from the ages of 15 to 44 who were eligible. Torres, Donovan, Dittes, and Forrest, *Public Benefits and Costs of Government Funding for Abortion*, Vol. 18, No. 3, Fam. Plan. Persp. 111 (May/June 1986). A staff report of the U.S. Senate Judiciary Committee indicated that most experts believe that between one in five and one in eight women in the United States are raped at some point in their lives. *Violence Against Women: A Week in the Life of America*, Report by the Majority Staff of the U.S. Senate Judiciary Committee (October, 1992) at 2.

Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). A federal court's jurisdiction can be invoked only when the plaintiff has suffered "some threatened or actual injury resulting from the putatively illegal action." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). The Supreme Court defined the constitutional requirements of standing in *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984): "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Defendants contend that plaintiffs have "failed to present any situation in which they have incurred a direct and concrete injury." (Defendants' response to summary judgment motion, at 15).

It is clear that there is an actual controversy in this case. In *Doe v. Bolton*, 410 U.S. 179, 188-189, 93 S.Ct. 739, 745-746, 35 L.Ed.2d 201 (1973) and *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), the Supreme Court held that physicians have standing to assert the rights of their patients. The Court in *Singleton* found that the physicians had suffered concrete injury from a Missouri statute that excluded abortions that are not "medically indicated" from the purposes for which Medicaid benefits are available to needy persons. *Singleton*, at 106, 96 S.Ct. at 2870. The physician-plaintiffs alleged a sufficiently concrete interest in the outcome of their suit to make it a "case or controversy" under Article III, for they "have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the limitation of reimbursable abortions to those that are 'medically indicated.' If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions. The State (and Federal Government) will be out of pocket by the amount of the payments." *Id.* On the standing matter as to whether the physicians were proper proponents of the particular legal rights at issue, Justice Blackmun stated:

> A woman cannot safely secure an abortion without a

physician's aid, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. Aside from the woman herself, the physician is uniquely qualified, by virtue of his confidential, professional relationship with her, to litigate the constitutionality of the State's interference with, or discrimination against, the abortion decision. Moreover, there are obstacles to the woman's assertion of her own rights, in that the desire to protect her privacy may deter her from herself bringing suit, and her claim will soon become at least technically moot if her indigency forces her to forgo the abortion. *Singleton*, at 111-118, 96 S.Ct. at 2873-2876.

[4, 5] Although the facts and state statute involved in *Singleton* were not identical to those in *Little Rock Family Planning Services v. Dalton*, the standing of physicians to assert the rights of their patients is beyond debate. Pursuant to *Singleton* and other cases finding standing of physicians in this type of controversy, it is clear that plaintiffs have standing in the case at bar. Any doubts about standing are removed by the facts that the plaintiffs have provided and will continue to provide abortions to "Arkansas Medicaid-eligible patients who are pregnant due to an act of rape or incest." (Declaration of Carolyn Izard, Jan. 24, 1994, at 1; Declaration of Curtis Stover, M.D.; Declaration of William Harrison, M.D.; Affidavit of Tom Tvedten, M.D.).[2]

[6-8] Plaintiffs do not have to await possible legal action by the Health Care Financing Administration (HCFA) before

[2]It is also clear that the class of plaintiffs who are "Medicaid-eligible women" to whom the other plaintiffs provide health care also have standing. *Roe v. Wade*, 410 U.S. 113, 124, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973). The Court ruled that when pregnancy "is a significant fact in the litigation . . . [it] will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid . . . Therefore, Jane Roe had standing."

seeking judicial relief. As the Supreme Court held in *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) it is "peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Rosado*, at 423, 90 S.Ct. at 1223. Under a substantial line of cases that will be discussed later in this Order, Arkansas' obligation to cover abortions for women pregnant as a result of rape or incest began when the 1994 Hyde Amendment became effective in October, 1993. *See, e.g., Roe v. Casey*, 623 F.2d 829 (3d Cir. 1980); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S.907, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980); and *Hodgson v. Board of County Commissioners, County of Hennepin*, 614 F.2d 601 (8th Cir. 1980). Defendants have devoted considerable argument in this case to administrative law issues regarding certain HFCA directives to state Medicaid directors, and they contend that the case is not ripe, based upon these administrative law questions. These arguments are misplaced, for there is no pending administrative action in this case, which is determined by strictly legal issues related to the *Roe v. Casey* line of cases cited above and other decisions dealing with Title XIX of the Social Security Act and the Hyde Amendment. As will be discussed in this Order, defendants failed to either distinguish these federal court decisions or show that they were wrongly decided. There is no reason to reach the administrative law questions discussed by the parties. The central issue in this case is whether there is a conflict between Arkansas Amendment 68 and the 1994 Hyde Amendment. The matter of this Court's jurisdiction is determined by the facts that plaintiffs have performed and will continue to perform abortions for which they would be reimbursed under the Medicaid program were it not for Amendment 68. Amendment 68 causes plaintiffs direct injury when they must either turn away or pay the costs for Medicaid-eligible survivors of rape and incest who need abortions; hence the plaintiffs' claim is ripe for review.

MEDICAID AND THE HYDE AMENDMENT

Title XIX of the Social Security Act of 1965, 42 U.S.C. § 1396, established the federal Medicaid program. The opening section of the statute authorizes an appropriation for each fiscal year and sets forth a basic statement of purpose: the act is to enable "each State, as far as practicable under the conditions in such state, to furnish medical assistance on behalf of . . . [those] whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396; *Beal v. Doe*, 432 U.S. 438, 444, 97 S.Ct. 2366, 2370, 53 L.Ed.2d 464 (1977). The Eighth Circuit has ruled that "Title XIX of the Social Security Act, commonly known as the Medicaid Act, is a federal-state cooperative program designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of medical care. Although a state's participation is voluntary, once a state chooses to participate in the program it must comply with federal statutory and regulatory requirements." *Weaver v. Reagen*, 886 F.2d 194, 196 (8th Cir. 1989); citing *Alexander v. Choate*, 469 U.S. 287, 289 n. 1, 105 S.Ct. 712, 714 n. 1, 83 L.Ed.2d 661 (1985).

[9] States choosing to participate in the Medicaid program may elect to provide medical services either to the "categorically needy" only, or to both the "categorically needy" and the "medically needy." 42 U.S.C. § 1396a(a)(10)(A) and 42 U.S.C. § 1396a(a)(10)(C). The "categorically needy" are those who receive financial aid from certain specified federal aid programs; the "medically needy" are those who do not qualify for some forms of federal assistance but who nonetheless lack the resources to obtain adequate medical care. *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 124 (1st Cir. 1979) *cert. denied*. 441 U.S. 952, 99 S.Ct. 2181, 2182, 60 L.Ed.2d 1057 (1979); *Hodgson v. Board of County Commissioners, County of Hennepin*, 614 F.2d 601, 606 (8th Cir. 1980). Arkansas provides services to both the categorically needy and the medically needy. 20 A.C.A. 77. Participating states must adopt a Medicaid plan explaining the state's eligibility requirements and the services that will be funded; the plan must gain

approval from the federal government. Defendants state that "within the State plan there are state assurances of full compliance with federal law and regulations." 42 C.F.R. § 430.10. The state must "include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of Title XIX." *Hodgson*, supra, at 607. Under Title XIX, certain categories of medical care are mandatory and must be provided by every state Medicaid program, while certain other categories are optional and coverage is at the state's discretion: the mandatory categories include "(1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facilities, [early and periodic screening, diagnostic and treatment services, or 'ESPDT] for persons under the age of 21 and family planning services and supplies, and (5) physicians' services." *Preterm*, supra, at 124; 42 U.S.C. § 1396d(a). Abortion falls within several of the mandatory categories, including family planning services, physicians' services, outpatient hospital services, and inpatient hospital services. *Doe v. Busbee*, 481 F.Supp. 46, 49 (N.D. Georgia 1979); *Roe v. Norton*, 522 F.2d 928, 933 (2nd Cir. 1975), *rev'd on other grounds, Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977).

Under Arkansas' plan, the categorically needy and medically needy are entitled to receive inpatient hospital services, outpatient hospital services, family planning services, physicians' services and ESPDT services. Arkansas and other participating states are required by federal regulations to make certain that "each service must be sufficient in amount, duration and scope to reasonably achieve its purpose. The Medicaid agency [the state agency administering the state's plan for medical assistance] may not deny or reduce the amount, duration, or scope of a required service . . . for the categorically needy and . . . the medically needy to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(b) and (c)(1).[3]

[3]Courts have cited this provision in ruling that an abortion needed to prevent mental health damage should not be considered less important than one designed to prevent physical health damage.

Regarding mandatory services, the state plan must cover medical services that a person's physician certifies are "medically necessary." *Weaver*, supra, at 200; *Pinneke v. Preisser*, 623 F.2d 546, 548 n. 2 (8th Cir. 1980). Courts have recognized that "the decision of whether or not certain treatment or a particular type of treatment is 'medically necessary' rests with the individual recipient's physician and not with clerical personnel or government officials." *Pinneke*, at 550. The Supreme Court stated in *Doe v. Bolton*, 410 U.S. 179, 192, 93 S.Ct. 739, 747, 35 L.Ed.2d 201 (1973) in reviewing a Georgia statute that "the medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."

[10, 11] Defendants allege that Congress has not set forth specific requirements in Title XIX to cover abortions. Plaintiffs, however, correctly point out that the absence of the word "abortion" in Title XIX is irrelevant, for Title XIX does not identify *any* specific medical procedures, whether they are cesarean sections, transfusions, bypass surgery, or abortions. (Plaintiffs' reply to defendants' response to plaintiffs' sum-

[3]continued
The Court in *Preterm* was troubled by the language in the 1978 fiscal year Hyde Amendment that permitted funds for abortions needed to prevent "severe and long-lasting physical health damage." *Preterm*, supra, at 131. The Court was concerned that the reference to "physical health damage" impliedly excluded abortions needed to prevent "severe and long-lasting mental health damage . . . Such a discrimination carried to the point of total denial of abortion services when serious injury to a person's mental health if the pregnancy is carried to term is diagnosed, cannot, we believe, be considered to be based on medical need. The discrimination sets up a presumption that physical health damage is always more serious and hence more important to prevent than mental health damage, a presumption that is nothing less than absurd." *Id.* The current version of the Hyde Amendment does not make any distinction between physical and mental health.

mary jugment motion, March 4, 1994, at 4). What Title XIX does is to specify the categories of care cited above that every state Medicaid program must cover when "medically necessary" (physicians' services, family planning services, inpatient hospital services, outpatient hospital services). 42 U.S.C. § 1396d(a)(i-v). Because abortion falls within several of these mandated categories, a medically necessary abortion is a mandatory covered service. As will be discussed below, Title XIX and the Hyde Amendment establish the minimum circumstances in which a state's Medicaid program must cover abortions.

Since abortion falls within several of the mandatory categories, between 1973 and 1976 Medicaid covered medically necessary abortions. However, in 1976, Congress enacted the Hyde Amendment to the Health, Education and Welfare appropriation for fiscal 1977. The original Hyde Amendment prohibited federal reimbursements for abortions except for the categories Congress declared medically necessary, which at that time included only cases where the "life of the mother would be endangered if the fetus were carried to term." *Roe v. Casey*, 623 F.2d 829, 833 n. 10 (3d Cir. 1980). The Amendment does not restrict participating states' use of state funds to provide abortions through Medicaid or any other state program, as the states remain free to fund more abortions than those for which federal funds were made available under the Hyde Amendment. *Preterm*, supra, at 134.[4] A subsequent version of the Amendment expanded the funding to include victims of rape or incest and "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." *Roe v. Casey*, at 833 n. 10. The fiscal year 1980 Hyde Amendment deleted the category regarding "physical

[4]Thirteen states now cover all medically necessary abortions for indigent women from state funds that are not matched by federal funds. Another six states — Iowa, Minnesota, Pennsylvania, Virginia, Wisconsin and Wyoming — covered abortions for rape and incest survivors even before they were required by the Hyde Amendment to do so.

health damage" but still included the category for victims of rape or incest. *Id.* From fiscal years 1982 to 1993 the Hyde Amendment limited medically necessary and thus federally funded abortions to cases where the mother's life was in danger. On Oct. 22, 1993, the Amendment changed again, as President Clinton signed into law a version of the Hyde Amendment that provides federal Medicaid funds for the larger range of abortions that had existed in the 1982 federal budget. The Amendment now provides that "None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest." (Appropriations for the Departments of Labor, Health, and Human Services, and Education, for the fiscal year ending Sept. 30, 1994).

In 1988, Arkansas added Amendment 68 to its Constitution by a vote of 398,107 to 368,117, thus restricting state Medicaid coverage of abortions. The Amendment states: "No public funds will be used to pay for any abortion, except to save the mother's life. The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution. This amendment will not affect contraceptives or require an appropriation of public funds." Arkansas' Medicaid plan reflects the provisions of Amendment 68, which is challenged in the instant case. There have also been recent challenges to restrictions on Medicaid coverage of abortion in Pennsylvania, Florida, Michigan, Minnesota, Texas, Idaho, Montana, Colorado and Illinois. The parties acknowledge that the issues presented in this case are similar to those in other litigation throughout the country where states are encountering challenges to their Medicaid plan.

AMENDMENT 68 IS IN CONFLICT WITH THE 1994 HYDE AMENDMENT

[12] The Supremacy Clause of the United States Constitution, Article VI, Clause 2, provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Surpemacy Clause requires courts to declare invalid any state constitutional provision that conflicts with federal law. *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S.Ct. 1362, 1393, 12 L.Ed.2d 506 (1964). As the Court emphasized in invalidating an Arkansas constitutional amendment that opposed United States Supreme Court desegregation decisions, state constitutional provisions are no different than other state laws regarding Supremacy Clause issues. *Dietz v. Arkansas*, 709 F.Supp. 902 (E.D., Arkansas, 1989). In another case dealing with, *inter alia*, the Supremacy Clause, the Eighth Circuit ruled that "Missouri participates in a federal program [in that case Aid to Families with Dependent Children] and receives federal funds. As a condition of receiving such funds, Missouri must comply with program requirements and cannot refuse to comply with federal regulations governing the program by simply stating that the monies it seeks to recover are governed by state law." *Jackson v. Rapps*, 947 F.2d 332, 337 (8th Cir. 1992).

Several federal court decisions were handed down in 1979-1980 that dealt with issues that are similar to those presented in the case at bar.[5] *Roe v. Casey*, supra, involved a Pennsylvania

[5]In this Court's June 7, 1994 Order granting defendants' motion to file a supplemental brief and requesting 20 days in which to do so, the Court asked defendants to address these federal court decisions. In its June 23 supplemental brief, defendants stated that "This Court has ordered defendants to file a brief addressing several issues currently before the Court." Actually, the Court stated in its June 7 Order that "Defendants may respond to any of the issues plaintiff discussed in its briefs and any other relevant issue they choose to address." The Court also asked defendants to address several other issues. Defendants, in fact, received three Orders granting extensions of time in which to file briefs in the course of this litigation. (Orders of Nov. 26, 1993; Feb. 4, 1994; and June 7, 1994.) The Court was pleased to give both parties ample opportunity to research and state their arguments regarding this case, and as a result, both parties provided the Court with an exhaustive treatment of the legal issues involved.

state law that was similar to Arkansas Amendment 68 in that it prohibited the Commonwealth from "paying for, making reimbursement for, or otherwise . . . supporting the performance of any abortion except where the abortion is certified in writing by a physician to be necessary to save the life of the mother." *Casey*, at 831. The Hyde Amendment that was in effect at the time of *Casey* (it was approved in November, 1979, for the fiscal year 1980) was similar to this year's Amendment, since it expanded funding to include not only abortions to save the mother's life, but also in cases of rape or incest. *Id.* at 833 n. 1. The *Casey* Court ruled that the Hyde Amendment constitutes a substantive modification of Title XIX. *Id.* at 836. In striking down the Pennsylvania law, the Third Circuit held:

> Title XIX [of the Social Security Act, commonly known as the Medicaid Act] as now modified requires the states to fund abortions in two categories: where the mother is endangered and where the pregnancy was the result of rape or incest. Pennsylvania, under Public Laws 16A and 148, would not fund the second category. Because Pennsylvania's statutes are not consistent with the modified Title XIX it is clear that, as written, they cannot stand. To conform with the Hyde Amendment, the Pennsylvania statutes would have to provide funding for rape and incest cases in addition to those situations where abortions are necessary because of danger to the mother's life. *Id.* at 836-837.

The *Roe v. Casey* Court pointed out that "Three other circuit courts have recently dealt with these issues. *Hodgson v. Board of County Commissioners*, 614 F.2d 601 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir. 1979), *cert. denied*, 441 U.S. 952, 99 S.Ct. 2181, 2182, 60 L.Ed.2d 1057 (1979); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979). Our reasoning in this appeal is essentially in accord with the reasoning of the First, Seventh and Eighth Circuits." *Id.* at 831 n. 5. In *Hodgson*, the Eighth Circuit ruled that "Title XIX, as originally enacted, conflicts with and thus supersedes Minnesota's statutory restriction on abortion financing. We also hold, however, that the Hyde Amendment has altered Title XIX's requirements, with the result that, as a statutory matter, Minnesota need only finance those abortions contemplated by the Hyde Amendment." *Hodgson*, at 605. The Minnesota statute at issue was not identical to Arkansas Amendment 68, as the statute provided medical payment reimbursements for abortions necessary to prevent the woman's death or to terminate pregnancies resulting from rape or incest, but the Eighth Circuit clearly stated the basic principle that Minnesota must finance "those abortions contemplated by the Hyde Amendment." *Id.* at 601, 605.

In *Frieman, M.D. v. Walsh*, 481 F.Supp. 137, 139 (W.D. Missouri, C.D., 1979), the Court dealt with Missouri statutory and regulatory law that prohibited public funds from being expended on abortions except where the mother's life was endangered. The Court enjoined Missouri from enforcing its state law "except insofar as it is consistent with the language of the current Hyde Amendment. Defendants are further ordered to provide funding for all abortions for which the federal government contributes its share pursuant to the Medicaid Act and to continue to provide such funding for so long as it is a participant in the federal Medicaid program." *Id.* at 147. Citing *Hodgson, Preterm*, supra, and *Zbaraz*, supra, the Eighth Circuit stated in reviewing the District Court's decision in *Frieman v. Walsh* that, "We therefore affirm the district court on its Hyde Amendment holding." *Reproductive Health Services v. Freeman*, 614 F.2d 585, 591-592 (8th Cir. 1980); *vacated on other grounds*, 449 U.S. 809, 101 S.Ct. 57, 66 L.Ed.2d 13 (1980).

The Seventh and First Circuits also handed down rulings similar to those in *Roe v. Casey* and *Hodgson*. In *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), the Seventh Circuit dealt with an Illinois statute that withdrew funding for all abortions except those necessary to save the mother's life. The Seventh Circuit concluded that "The Court of Appeals for the First Circuit has recently ruled on a challenge to the Massachusetts abortion funding law that is nearly identical to the challenge mounted here to the similar Illinois law. *Preterm, Inc. v.*

Dukakis [supra] . . . We agree with the conclusion of the majority in *Preterm* that the Hyde Amendment alters Title XIX in such a way as to allow states to limit funding to the categories specified in that amendment." *Zbaraz*, at 198. In *Preterm*, the First Circuit enjoined implementation of the Massachusetts statute "insofar as it prohibits state reimbursement for abortions which would qualify for federal reimbursement under the terms of the Hyde Amendment." *Preterm*, at 134. Similarly, the *Zbaraz* Court held that the Hyde Amendment mandated abortion funding in two categories of cases not covered by the Illinois statute — "cases of promptly reported rape or incest, and cases in which severe and long-lasting damage to the mother's physical health would result from continuing the pregnancy. Illinois is required to fund abortions falling into these categories under its Medicaid plan and is entitled to the usual federal reimbursement." *Zbaraz*, at 199 n. 7.

The intent of Congress in passing the 1994 Hyde Amendment was made clear during the floor debates. Members of Congress from both sides of the ideological debate concerning abortion made explicit in the legislative history of the Hyde Amendment that state Medicaid programs must cover abortion to the extent that federal matching funds are available. Senator Orrin Hatch stated during the debate on the Hyde Amendment that "If federal funding of abortion is mandated through Medicaid, every state will be required to provide matching funds for abortion on demand." 139 *Cong.Rec.* 12,581 (Sept. 28, 1993). An opponent of the Hyde Amendment's general funding restrictions stated that those restrictions would require Medicaid funding "only in certain circumstances; rape, incest, or to save the life of a woman. Those are excellent criteria. But they should not be the only criteria . . ." 139 *Cong.Rec.* S12,582 (Statement of Sen. Mikulski, Sept. 28, 1993). An opponent of expanding the Hyde exceptions stated that he disliked the expanded funding "which includes exceptions for rape and incest." *Id.* at S12,587 (Statement of Sen. Hatfield, Sept. 28, 1993). Another abortion opponent asserted that "If we have this as a federal government policy

for the federal government to pay for abortion, the states likewise have to match those funds . . . This is not a state opt-out. There are no state options. States have to match the federal funds." *Id.* at S12,588 (Statement of Sen. Nickles).

Plaintiffs point out that in previous years, when Congress has intended coverage of abortions falling in the Hyde Amendment's scope to be discretionary with the states, it explicitly provided for it; in the fiscal year 1981 Hyde Amendment (the Amendment passed the year after the 1980 fiscal year Amendment that was considered in *Roe v. Casey*) the Congress added the "Bauman Amendment" language to the Hyde Amendment: "Provided, however, that the several states are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." Pub.L. 96-369, Seciton 101(c), 94 Stat. 1353 (96th Congress) (Oct. 1, 1980). The 1994 Hyde Amendment does not grant states the discretion to cover abortions for which federal money is appropriated, and this absence of "Bauman Amendment" language also supports the conclusion that Arkansas must cover all abortions for which federal funding is available. Although plaintiff's argument is plausible on this point, *Roe v. Casey* and the other cases discussed in this Order provide ample authority supporting plaintiff's basic position, even without relying upon the contention regarding the absence of "Bauman Amendment" language in the 1994 version of the Hyde Amendment.

A recent decision in a Montana state court involves issues similar to those in the instant case. A Montana administrative regulation provided that in order to receive Medicaid payments, a physician had to find that the mother's life would be endangered; the dispute in that case arose out of the conflict between Montana state law and the 1994 Hyde Amendment. *Jeanette R., et al., v. State of Montana, Nancy Ellery, as Administrator of the Medicaid Services Division of the Montana Department of Social and Rehabilitation Services*, No. BDV-94-811, Montana First Judicial District Court, June 1, 1994. (See the Montana Court's opinion published as an

appendix to this opinion.) The Montana Court relied upon *Roe v. Casey* and similar federal decisions in rejecting the defendants' contention that they need not provide Medicaid funding for abortions resulting from rape or incest: "The federal decisions are basically to the effect that a state's Medicare funding program cannot be more restrictive than the Hyde Amendment. A case almost identical to the present case is *Roe v. Casey* . . . The version of the Hyde Amendment with which the *Roe* Court was dealing was almost identical to the one with which we are here involved." *Jeanette R.*, infra, at 629. The Court in *Jeanette R.* enjoined Montana from restricting Medicaid reimbursement for abortions in a manner inconsistent with the Hyde Amendment, holding that "Montana cannot have a Medicaid reimbursement formula that is more restrictive than the formula provided by the federal government . . . If Montana uses federal Medicaid funds, it must follow the federal law." *Id.* at 630-631.

In a similar case in Michigan, the U.S. District Court held that a state statute prohibiting public funding for abortions except to save the mother's life "cannot stand. Accordingly, the Court will enjoin defendants from enforcing [the Michigan statute] insofar as it prohibits state funding for abortions to terminate pregnancies resulting from acts of rape or incest, as required by Title XIX, modified by the Hyde Amendment, while at the same time accepting federal funds pursuant to Title XIX." *Planned Parenthood Affiliates of Michigan v. Engler*, 860 F.Supp. 406, 407, 410 (W.D.Michigan 1994).

Defendants contend that *Zbaraz* and the three other Circuit Court cases cited above would not lead to the conclusion that Arkansas is obligated to cover abortions for rape and incest in its Medicaid program, stating that "all these cases predate a U.S. Supreme Court decision concerning the Hyde Amendment" — *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). (Defendant's supplemental brief, at 2.) The Court disagrees with defendants' reliance on *Harris*; far from undermining the holding of the four relevant Circuit Court decisions, *Harris* actually cited all four of them with

approval. *Harris*, supra, at 310, 100 S.Ct. at 2684. *Harris* involved a much broader and different set of issues than the instant case; in *Harris*, a number of indigent pregnant women as well as hospitals that performed abortions challenged the Hyde Amendment in its entirety, arguing that it unconstitutionally limited the funding of abortions to a restricted category while permitting the funding of costs associated with childbirth. In contrast, in *Little Rock Family Planning Services v. Dalton*, the plaintiffs are relying upon the Hyde Amendment rather than attacking it. The *Harris* Court began with the proposition that a state participating in the Medicaid program is not obligated under Title XIX "to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." *Id.* The holdings in *Harris* upheld the Hyde Amendment against an argument that the Amendment's restrictions on the availability of certain medically necessary abortions under Medicaid impinged on the liberty protected by the Due Process Clause of the Fourteenth Amendment of a woman to decide whether to terminate a pregnancy. *Harris*, at 312, 100 S.Ct. at 2685, citing *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).[6] *Harris* also upheld the Amendment against the argument that it was unconstitutionally vague because "physicians are unable to understand or implement the exceptions in the Hyde Amendment under which abortions are reimbursable." *Id.*, 448 U.S. at 311, 10 S.Ct. at 2685. The Court rejected this argument, concluding that "the exceptions in the Hyde Amendment 'are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.'" *Id.*,

[6]Much of the opinion in *Harris* dealt with an issue wholly unrelated to the case at bar — it upheld the Hyde Amendment against a challenge that it violated the Establishment Clause's prohibition against any "law respecting an establishment of religion," based upon an allegation that the Hyde Amendment incorporates into law Roman Catholic doctrine concerning the "sinfulness" of abortion and the time at which life commences. *Harris*, 448 U.S. at 311, 319, 100 S.Ct. at 2685, 2689. Obviously, no Establishment Clause issues have been presented to the Court in the case at bar.

citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). In the Supreme Court's rulings upholding the Amendment, and in the Court's assumption that funding was required for all abortions for which federal funding was available, *Harris* was perfectly consistent with the four Circuit Court decisions.

Defendants also cite the ruling in *Webster v. Reproductive Health Services, et al.*, 492 U.S. 490, 509, 109 S.Ct. 3040, 3052, 106 L.Ed.2d 410 (1989) that "Nothing in the Constitution requires States to enter or remain in the business of performing abortions." *Webster*, at 510, 109 S.Ct. at 3052. Again, *Webster* involved a much broader set of questions than the relatively narrow category of issues in *Little Rock Family Planning Services*. While stopping short of arguing that *Roe v. Wade* should be overruled, the plurality opinion in *Webster* launched a sharp critique against *Roe*'s fundamental trimester framework, (although a subsequent Supreme Court case explicitly held that *Roe v. Wade* remains the law of the land, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)), which it criticized as "unworkable in practice;" the Court also addressed an issue regarding the broad question of when human life begins, and a series of detailed regulations regarding abortion in a Missouri statute. *Webster*, 492 U.S. at 490-491, 511-517, 109 S.Ct. at 3041-3043, 3053-3056. Such fundamental issues involving the basic validity of *Roe v. Wade* and progeny soar far beyond the limited range of issues involved in this case, which exclusively deals with the inconsistency between Arkansas Amendment 68 and the 1994 Hyde Amendment.

It is certainly correct that states are not constitutionally required (except, of course, from the standpoint of the Supremacy Clause issues discussed above) to fund abortions; as the Supreme Court ruled in *Maher v. Roe*, 432 U.S. 464, 469, 97 S.Ct. 2376, 2380, 53 L.Ed.2d 484 (1977), "the Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." *Maher*, at 469, 97

S.Ct. at 2380. *Webster* cited the general proposition that "Our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Webster*, supra, 492 U.S. at 507, 109 S.Ct. at 3051, citing *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989). The Court stated in *Harris v. McRae* that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls into the latter category." *Harris*, 448 U.S. at 316, 100 S.Ct. at 2687. Yet, the Court made it clear in *Harris* that whether a woman's constitutionally protected freedom of choice to terminate a pregnancy warrants subsidization "is a question for Congress, not a matter of constitutional entitlement" *Harris*, 448 U.S. at 318-19, 100 S.Ct. at 2689. The constitutional rulings regarding abortion in general that defendant cites from *Webster* are much broader than the specific question of whether Congress decided that subsidization is warranted in the narrow category of Hyde Amendment exceptions for saving the mother's life, rape and incest. Congress spoke to this issue clearly in the Amendment and its exceptions, and in similar decisions courts have clearly ruled in a manner supporting plaintiffs' substantive position in the case at bar. *Roe v. Casey*, *Hodgson*, *Zbaraz*, *Preterm*, *Frieman v. Walsh*, 481 F.Supp. at 147, supra, *Jeanette R.*, supra, and *Planned Parenthood Affiliates of Michigan v. Engler*, 860 F.Supp. 406 (W.D.Michigan 1994).

In support of its summary judgment motion, plaintiffs also cite the Dec. 28, 1993 directive from the Director of the Medicaid Bureau of the federal Health Care Financing Administration (HFCA) to state Medicaid directors, which directive stated that "As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the mother's life are medically necessary. In addition, Congress this year added abortions for

pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided . . . Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary." (Plaintiffs' motion for summary judgment, at 11.) Similarly, plaintiffs note that the Jan. 5, 1994 letter of the Administrator of HFCA to Ray Hanley, Arkansas' Medicaid Director, stated that if state law conflicts with the current Hyde Amendment "court decisions require that state law give way to federal law insofar as it applies to the Medicaid program. *Id.* In addition, plaintiffs cite the March 25, 1994 letter of Sally Richardson, Director of the HFCA Medicaid Bureau, to all the state Medicaid directors in which she stated, "Federal courts that have considered this issue in the past have held that State law impediments cannot stand in the way of an individual's entitlement under a State's Medicaid program to medically necessary services, including abortions, for which Federal funds are available." (Plaintiffs' supplemental brief of April 7, 1994, at 2.) Plaintiffs concede, however, that it is not necessary for them to rely on the HFCA directives, and this Court agrees; the other precedents cited in this Order are more than sufficient to decide this case. No administrative action is pending in this case, which involves strictly legal issues. While the summaries of "federal court decisions" in the HFCA letters are correct, the Court need not reach the administrative law issues of whether these agency directives are entitled to substantial deference by this Court, because the four Circuit Court decisions cited above, other cases and the Hyde Amendment's legislative history are clearly sufficient to resolve the dispositive issue in this case.

THIS COURT CANNOT REWRITE AMENDMENT 68

[13, 14] Pursuant to the above analysis, Amendment 68 violates the Supremacy Clause because it is in conflict with federal law. The Amendment's Section 1, which states that "No public funds will be used to pay for any abortion, except to save the mother's life," is invalid and its enforcement is enjoined. This Court cannot rewrite Amendment 68 to

preserve its constitutionality. In addressing a similar issue in *Roe v. Casey*, the Third Circuit concluded that to conform with the Hyde Amendment, Pennsylvania state law would have to provide funding for rape and incest cases in addition to abortions needed to save the mother's life. *Roe v. Casey*, supra, at 837. This would have required additions of specific language to the state laws, and Pennsylvania permits courts to add wording to its statutes only when such additions do not "in any way affect the scope and operation of the statute." The Court concluded that if it added provisions to the Pennsylvania statute to require payment for abortions in cases of rape and incest, the scope and operation of the state enactments would obviously be expanded. "In that event," the Court emphasized, "we would have exceeded our judicial role and we would be engaging in positive legislative enactment, a proper function of the Pennsylvania Assembly, which it has reserved to itself . . . Long established principles of federal law also dictate against courts inserting limitations in order to rescue otherwise invalid statutes." *Id.; Baird v. Bellotti*, 450 F.Supp. 997 (D.Mass. 1978), *affirmed*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979).

In holding that it could not redraft the Pennsylvania prohibition on state funding of abortion, the Third Circuit stated:

> "There is nothing in the record to indicate what course Pennsylvania would choose to follow given the amendment to Title XIX by the Hyde enactment and we are not free to substitute our speculation for the judgment of the duly constituted officials of the state. This court should refrain from acting on a 'matter which properly requires the exercise of policy judgment by the legislature.'" 2A Sands, Sutherland, *Statutory Construction*, Section 47.36 (4th ed. 1973).

The Eighth Circuit cited *Roe v. Casey* in a similar case in which it refused to preserve a state statute by rewriting it. *Valley Family Planning v. State of North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981). In *Valley Family Planning*, plaintiffs

challenged a North Dakota statute providing that no state funds "shall be used as family planning funds by any person, public or private agency which performs, refers, or encourages abortion." *Id.* at 100. The Eighth Circuit held that the statute was in conflict with a federal provision mandating that comprehensive health care be provided by its grantees, including referrals to other services that were medically indicated, and thus the state statute was invalid under the Supremacy Clause. *Id.* In refusing to rewrite the statute, the Court held that "We are not inclined to cure the invalidity of [the North Dakota statute] by writing in exceptions to its referral prohibition; that would involve this Court in positive legislative enactment clearly beyond its judicial role. *See Roe v. Casey*, 623 F.2d 829, 837." *Valley Family Planning*, at 102.

Federal courts have frequently stressed the importance of declining to redraft invalid state enactments, citing principles of separation of powers as well as "federalism and comity." *Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991); *National Advertising Company v. Niagara*, 942 F.2d 145, 150 (2nd Cir. 1991). The Supreme Court ruled that "The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is not 'a license for the judiciary to rewrite language enacted by the legislature.'" *Chapman v. United States*, 500 U.S. 453, 464, 111 S.Ct. 1919, 1927, 114 L.Ed.2d 524 (1991); citing *United States v. Monsanto*, 491 U.S. 600, 611, 109 S.Ct. 2657, 2664, 105 L.Ed.2d 512 (1989). Similarly, the Eighth Circuit has held that "we find it beyond our power as a federal court to rewrite the broad, straightforward language [of the state provision] to avoid the constitutional difficulties presented by the plain meaning of its terms." *United Food and Commercial Workers International Union, AFL-CIO v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988). In *Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991), physicians challenged a Kentucky statute requiring physicians who performed abortions for minors to secure the signed and notarized "informed consent" of the minor and also of both parents "if available"; the District Court found portions of the state statute unconstitutional but preserved the statute by modifying one provision and severing the others. In reversing the trial court in part and affirming in part, the Circuit Court of Appeals held that "having found that the statute unduly burdened the right to an abortion, the District Court could not supply new limiting language to modify the statute so as to avoid unconstitutionality" but had to sever the unconstitutional section entirely. *Id.* The Sixth Circuit stressed that "In this case we must weigh both the need to keep legislative and judicial power separate and the need to respect state judicial policy regarding revision of state statutes. In applying the doctrine of judicial review, our jurisprudence in this area of interpretation stresses both separation of powers and federalism concerns." *Id.*, at 1127. Similarly, in striking down an ordinance in its entirety the Second Circuit cited "the interests of federalism and comity dictate conservatism in imposing our interpretive views on state statutes. *See Brockett v. Spokane Arcades*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (O'Connor, J., concurring). Mindful of our responsibility to respect . . . federalism, we find that the ordinance must be declared unconstitutional as a whole." *National Advertising Co. v. Niagara*, supra, at 151.

The Arkansas Supreme Court has held that in construing a constitutional amendment passed by voter initiative, when part of the amendment was held invalid, "the intent of the people is controlling." *Faubus v. Kinney*, 239 Ark. 443, 450, 389 S.W.2d 887 (1965). This Court lacks any compass to direct it in redrafting the provision to make it conform to federal law as well as to the wishes of Arkansas voters. To follow the Hyde Amendment, the state must establish two additional classes of funding for rape and incest victims. It is not possible for this Court to divine all the details involved regarding how Arkansas would wish to do that, for the extension of coverage raises several issues. Plaintiff points out that the relevant issues would include: whether Medicaid coverage would be based upon a reporting or documenting of the rape or incest; whether there would be a time limit on the reporting requirement; to whom would the report be addressed; would the confi-

dentiality of the reporting woman or girl be protected; would the burden of reporting be on the woman or girl, or her doctor; would the victim have to name the perpetrator in the report; would waivers of the reporting requirement be authorized; and how would rape and incest be defined for purposes of Medicaid reimbursement. The Court has no way of knowing how the people will resolve these detailed questions. Moreover, the manner in which all of these issues are resolved obviously cannot conflict with federal law.

The people of Arkansas may chooe to opt out of the Medicaid program entirely, or they may choose to adopt an expanded version of Amendment 68. Arkansas voters may extend coverage for medically necessary abortions to cases where there are fetal anomalies or where the woman's health would incur serious damage, or alternatively, they may choose to confine the state to the minimum provisions that must be covered, as mandated in the Hyde Amendment. This Court takes no position, of course, on any of these questions, and cannot know how the voters will choose to respond to the situation created by Amendment 68's conflict with federal law. Pursuant to its appropriate judicial role, the Court concludes that the Amendment must be stricken in its entirety, to enable the people or their elected representatives to decide h ow Arkansas will cover abortion in the state Medicaid program so that it will not conflict with federal law.

Defendants also contend that if Amendment 68, Section 1 is stricken, it must not be stricken in its entirety, citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) (in which the Bail Reform Act of 1984 was challenged as allegedly unconstitutional) for the proposition that "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth'

doctrine outside the limited context of the First Amendment." Defendants assert that *Salerno* bars facial challenges to Amendment 68. However, plaintiffs point out that this case is not a facial challenge to a law before its effective date. Amendment 68 prevents Arkansas' Medicaid program from complying with the Hyde Amendment that became effective late last year, and plaintiffs and their patients are being injured; therefore, this case does not present a mere hypothetical possibility that the Amendment "might operate unconstitutionally under some conceivable set of circumstances." *Salerno*, at 745, 107 S.Ct. at 2100. Plaintiffs are challenging the actual application of Amendment 68, and are not asserting a far-fetched construction that may never happen; in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514, 110 S.Ct. 2972, 2981, 111 L.Ed.2d 405 (1990), the Supreme Court reversed a Court of Appeals ruling that had invalidated a statute "on a facial challenge based upon a worst-case scenario that may never occur." Moreover, *Little Rock Family Planning Services* contrasts with *Salerno*, where the litigants did not argue that "the Act is unconstitutional because of the way it was applied to the particular facts of their case," *Salerno*, 481 U.S. at 745 n. 3, 107 S.Ct. at 2100 n. 3, whereas the plaintiffs here contend that they are injured by the application of Amendment 68's prohibition on abortion coverage for rape and incest survivors who are eligible for Medicaid.

[15] Defendants further argue that Amendment 68 "has other constitutional purposes" and thus survives the plaintiffs' challenge. Regarding these purported "other purposes," defendants state that the Arkansas Crime Victims Reparations Act, A.C.A. § 16-90-701 et seq. created the Crime Victims Reparations Board, which provides a method of compensating and assisting people in Arkansas who are victims of criminal acts and are injured or killed. "Allowable expense" under this Act includes medical care. A.C.A. § 16-90-703(7). The Board receives requests for payment of medical care to provide abortions, but these requests are denied based on Amendment 68. (Affidavit of Ginger Bailey). Defendants' argument regarding the alleged "other purposes" is without merit. Plaintiffs

point out that at best, this argument is based on the notion that Amendment 68, Section 1 is invalid regarding Medicaid recipients, but valid insofar as it applies to applicants to the Arkansas Crime Victims Reparations Board. Pursuant to *Roe v. Casey* and the other cases cited above stating the principle that federal courts should not rewrite state constitutional amendments, this Court will refrain from redrafting Amendment 68 to restrict its applicability to the Crime Victims Reparations Board. The Court has no way of discerning whether Arkansas voters would have passed the Amendment solely to limit assistance and reparations to indigent women who have been the victims of rape or incest.

Defendants contend that even if this Court "decides to strike Amendment 68, Section 1, the remaining sections of the amendment would be unaffected." (Defendant's response to plaintiff's summary judgment motion, at 19). Both parties agree that the issue of severability is based on state law. *Webster v. Reproductive Health Services*, supra, 492 U.S. at 524, 109 S.Ct. at 3060 (Justice O'Connor's concurring opinion); *Exxon v. Hunt*, 475 U.S. 355, 376, 106 S.Ct. 1103, 1116, 89 L.Ed.2d 364 (1986); *National Advertising Company v. Niagara*, supra, at 145. In addition to the core provision, Section 1 of Amendment 68, the other two Sections read as follows: "Section 2, Public Policy: The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution. Section 3, Effect of the amendment: This amendment will not affect contraceptives or require an appropriation of public funds." Amendment 68, Constitution of the State of Arkansas, Arkansas Code of 1987 Annotated, *Constitutions*.

[16, 17] The Court concludes that Amendment 68 does not contain several independent parts, so that after Section 1 is stricken, the rest cannot remain. There is an issue as to whether the State officials and the people of Arkansas would continue in the Medicaid program if the Hyde Amendment is enforced. Thus, the people should be given the opportunity to decide whether they wish to continue receiving federal funds under

the Medicaid Act. It would be improper for a federal court to redraft a state constitutional amendment. *Roe v. Casey*, at 837. As the Arkansas Supreme Court held in a major severability case, "The test should be the sufficiency for practical working purposes of that portion of the act remaining after" the invalid section has been removed. *Allen v. Langston*, 216 Ark. 77, 85, 224 S.W.2d 377 (1949); citing *Oliver v. Southern Trust Co.*, 138 Ark. 381, 212 S.W. 77 (1919). If the sections are "so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." *Id.*, 216 Ark. at 85, 224 S.W.2d 377. Rules governing the construction of statutes "are the same as those governing the construction of constitutional amendments." *Bailey v. Abington*, 201 Ark. 1072, 148 S.W.2d 176 (1941); *Faubus v. Kinney*, supra, 239 Ark. at 447, 389 S.W.2d 887. One relevant factor in making this determination is whether the provision contains a severability clause, and in this regard it is significant that Arkansas Amendment 68 does not have a severability clause. *Bates v. Bates*, 303 Ark. 89, 94, 793 S.W.2d 788 (1990). (The Arkansas Supreme Court has ruled that "The presence of a severability clause is a factor to be considered but, by itself, it may not be determinative." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 266, 872 S.W.2d 349 (1994)). In *Bates*, the Supreme Court struck down the Domestic Abuse Act, which had no severability clause, despite the Court's agreement with the legislative intent behind the Act, holding that because one section of the law impermissibly placed jurisdiction over domestic abuse proceedings in chancery court, the entire statute was invalid. *Id.* "When an act does not contain a severability clause, and the various parts of it are so interdependent that it cannot be presumed the General Assembly would have enacted one section without the other, the whole act must fail." *Id.*, 303 Ark. at 93-94, 793 S.W.2d 788. Plaintiff correctly points out that in *Handy Dan Improvement Center, Inc. v. Adams*, 276 Ark. 268, 633 S.W.2d 699 (1982) the state's Sunday closing laws were invalidated in their entirety

when the Court concluded that "The core provision of this act is Section 2," and since the provisions were dependent upon and connected with that core section, "the act is not severable and the entire act must fall on account of the invalidity of Section 2." *Handy Dan*, at 271, 277, 633 S.W.2d 699.

Similarly, in *Pryor v. Lowe*, 258 Ark. 188, 192, 523 S.W.2d 199 (1975), the Supreme Court held that the invalidity of a core provision on statutory limitations upon delegates to the "limited Constitutional Convention" rendered the entire act invalid. In a recent Arkansas Supreme Court case involving the Supremacy Clause and severability, the Court invalidated a section imposing term limits on federal officials because it was in conflict with federal law. *U.S. Term Limits*, supra, 316 Ark. at 266-269, 872 S.W.2d 349. Citing *Faubus v. Kinney*, supra, the Court then read the amendment as a whole to determine whether the remaining sections were "complete in [themselves] and capable of being executed wholly independent of that which was rejected." The Court concluded that the three sections of the amendment were "grammatically independent and functionally independent." *U.S. Term Limits*, at 268-269, 872 S.W.2d 349. "Nor do we consider term limits on federal legislators," the Court ruled, "to be the bait which enticed voters to vote aye on the amendment as a whole." *Id.* The section on limiting federal officials could function independently from the section limiting terms for state officials, so the Court severed the invalidated section from the remaining sections. *Id.* In contrast, Amendment 68, Section 1's function of banning the great majority of public funding for abortions operates as the core provision — Section 2 is a general public policy statement and philosophical foundation for Section 1, and Section 3 is merely a descriptive statement. The latter Sections, as noted above, have no function independent of the first section. *Id.*

[18] In the case at bar, Section 1 of Amendment 68 is the only section that has any independent force and is clearly the "core provision." *Handy Dan*, 276 Ark. at 271, 633 S.W.2d 699. Pursuant to *Allen*, supra, once Section 1's prohibition of

public funding for abortion except to save the mother's life is removed, the remaining sections of the Amendment have no "practical working purposes." *Allen*, 216 Ark. at 85, 224 S.W.2d 377. Section 2's statement that Arkansas' policy "is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution," is explicitly a philosophical statement of the state's public policy and it has no force independent of Section 1.[7] A public policy statement is not self-executing. *Forbes v. Ward*, No. 91-3149 (Chancery Court of Pulaski County, Fourth Division, June 30, 1993). The description of the effect of the amendment in Section 3 — "this amendment will not affect contraceptives or require an appropriation of public funds" — also has no effect independent of Section 1. The heart and "core provision" of

[7]In *Roe v. Wade*, supra, the Supreme Court concluded that "We need not resolve the difficult question of when life begins." *Roe v. Wade*, 410 U.S. at 159, 93 S.Ct. at 730. After reviewing the centuries of philosophical debate regarding this question, the Court concluded that "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." *Id.*, at 162, 93 S.Ct. at 731. In *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443, 103 S.Ct. 2481, 2499, 76 L.Ed.2d 687 (1983), the Court stated that "a State may not adopt one theory of when life begins to justify its regulation of abortions." In *Webster*, the Court dealt with the preamble to a Missouri statute that set forth "findings" that "life of each human being begins at conception," and "unborn children have protectable interests in life, health and well being." *Webster*, supra, 492 U.S. at 491, 109 S.Ct. at 3042. The Court in *Webster* upheld several operative provisions of the Missouri statute that were in separate parts of the act, and concluded that it was unnecessary to pass on the constitutionality of the preamble, which the Court concluded "constituted a value judgment" of the state. *Id.*

Plaintiff states that Section 2 of Amendment 68 could become operative by the passage of enabling legislation if *Roe v. Wade* were overruled. Since *Roe v. Wade* was explicitly reaffirmed by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) ("The doctrine of *stare decisis* requires reaffirmance of *Roe v. Wade*'s essential holding recognizing a woman's right to choose an abortion before fetal viability"), the question of passing enabling legislation for Section 2 is obviously moot.

Amendment 68 is Section 1, and the other sections are so "mutually connected with and dependent on" Section 1 that Sections 2 and 3 would not have been passed independently. *Allen*, at 85, 224 S.W.2d 377. Sections 2 and 3 would be without any operative effect if allowed to stand by themelves, hence the entire Amendment must be invalidated.

Defendant cites *Berry v. Gordon*, 237 Ark. 865, 866, 376 S.W.2d 279 (1964) for the proposition that "If the part which remains after the defective portion is severed is capable of carrying out the purpose of the legislature, the courts will have little difficulty in finding the legislative intent to make separable, even if no separability clause has been included." In *Berry*, one section of a statute was held unconstitutional but the others were held severable because they could stand independently in "carrying out the purpose" of the measure. *Id.* Regarding Amendment 68, the purpose of the document was to prohibit public funding for abortions except to save the life of the mother, and that purpose was dependent upon Section 1; under *Berry*, as under *Allen* and the other Arkansas cases cited, Amendment 68 fails the tests, for the other sections standing by themselves are incapable of carrying out the effect and purpose of the Amendment.

[19, 20] If the Court concludes it must strike Section 1 based on the Supremacy Clause, defendants argue that the remaining sections should be left intact based on court decisions ruling that although federal courts have broad equitable powers to remedy constitutional violations, they must tailor the scope of injunctive relief to fit the nature of the constitutional violation. *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987); *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 2558, 61 L.Ed.2d 176 (1979); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982). The Court finds that *Calvin Klein* is not on point. The eighth Circuit in *Klein* stated that Federal Rule of Civil Procedure 65(d) requires that every Order granting an injunction must set forth the reasons for it in specific terms and describe in reasonable detail the act or acts

sought to be restrained. Fed.R.Civ.P. 65(d). Rule 65(d)'s specificity requirement is designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed; in *Klein*, the Court stated that "although the degree of particularity required of an injunction depends on the subject matter involved, . . . we agree with Parfums [that a section of the Order granting injunctive relief] requires Parfums to guess at what kind of conduct" is prohibited. *Klein*, at 669. There is no issue of confusion regarding what defendants must do or refrain from doing in the instant case: this Court enjoins the enforcement of Amendment 68 in its entirety and it enjoins the enforcement of provisions of the Arkansas state plan relating to abortion funding that are inconsistent with the 1994 Hyde Amendment for so long as Arkansas accepts federal money under the Medicaid Act. Plaintiffs have no adequate remedy at law. Monetary damages are inadequate and incapable of redressing the deprivation of rights wrought by Amendment 68.

CONCLUSION

Arkansas Amendment 68 is inconsistent with the 1994 Hyde Amendment and therefore violates the Supremacy Clause. The Arkansas state plan insofar as it is inconsistent with the Hyde Amendment also violates the Supremacy Clause. The enforcement of Amendment 68 is hereby enjoined in its entirety for so long as the State of Arkansas accepts federal funds pursuant to the Medicaid Act. Likewise, the provisions of the Arkansas state plan that relate to abortion funding and are inconsistent with the Hyde Amendment are enjoined. Plaintiffs' motion for summary judgment is granted.

It is so ordered.

JUDGMENT

Pursuant to the Order filed in this matter, summary judgment is hereby granted on behalf of plaintiff Little Rock Family Planning Services, et al. All matters in this case having been resolved, the case is dismissed with prejudice.

It is so ordered.

APPENDIX

As mentioned in the text of the Court's Order, the Montana Court's opinion by Judge Jeffrey M. Sherlock in *Jeanette R., et al., v. State of Montana, Nancy Ellery, as Administrator of the Medicaid Services Division of the Montana Department of Social and Rehabilitation Services,* No. BDV-94-811, Montana First Judicial District Court, June 1, 1994, is hereby included as an appendix.

Montana First Judicial District Court
Lewis and Clark County

Cause No. BDV-94-811

Jeanette R., on behalf of herself and all others similarly situated; Susan Wicklund, M.D.; James H. Armstrong, M.D., on behalf of themselves and their Medicaid-eligible patients, Plaintiffs,

v.

State of Montana, Nancy Ellery, as Administrator of the Medicaid Services Division of the Montana Department of Social and Rehabilitation Services, in her individual and official capacities; Peter Blouke, as Director of the Montana Department of Social and Rehabilitation Services, in his individual and official capacities, and their successors, Defendants.

ORDER

The narrow question before this Court is whether the federal Medicaid laws, Title XIX of the Social Security Act, 42 U.S.C. Section 1396, et seq., or Section 509 of the 1994 Appropriations Act *requires the Montana State Medicaid Program to pay for abortions in cases where pregnancy is a result of rape or incest.*

Although many may characterize this as strictly an abortion case, in reality, it is nothing more than a case of statutory and constitutional construction. The fact that the

underlying subject is abortion raises a great deal of emotional consternation on all sides of the issue. This Court realizes that abortion is a very volatile issue in the country. Particularly is this the case when public funds are used for the abortion. Nonetheless, this Court's sole function is to read and enforce the law as it is written.

FACTUAL BACKGROUND

The Court held a hearing on this matter on May 31, 1994. Testifying was Dr. Susan Wicklund, a Bozeman physician who provides abortion services. Dr. Wicklund is one of the Plaintiffs in this action. Dr. Wicklund indicates that 20 percent of her patients are eligible for Medicaid reimbursement. The doctor indicated that once a woman has decided on an abortion, any delay is detrimental to the emotional and physical health of the patient. Further, Dr. Wicklund testified that many of her patients are forced to delay receiving an abortion because of a lack of funds. Dr. Wicklund stated that some of the delay attendant upon many abortions may be associated with the fact that a woman may not know that she is pregnant. Some delay also may be attributable to the decision-making process, and some may be attributable to the process of getting a woman transported from her home to Dr. Wicklund's office.

Dr. Wicklund testified that if she waived her fee for all Medicaid abortion patients, such a waiver would place a great financial burden on her clinic.

Another plaintiff in this action is Jeannette R. Jeannette became pregnant as a result of being raped by two men in March of 1994. She sought to have an abortion from Dr. Wicklund but was denied funding from Medicaid. Jeannette went ahead and had her abortion on May 26, 1994. She is apparently in desperate financial straits. She is a single mother who is struggling with paying her rent and going back to college to support herself and her child. Medicaid has thus far refused to pay for her abortion. If the fee is not waived, Jeannette will have to go without her educational plans or her rent payment.

The State presented no witnesses.

LEGAL DISCUSSION

This particular dispute arises out of a conflict between Montana's administrative regulation concerning Medicaid payment and a statute passed by Congress.

ARM 46.12.2002(1)(e) provides as follows:

> "Physician services for abortion procedures must meet the following requirements in order to receive medicaid payment: The physician has found, and certified in writing, that on the basis of his/her professional judgment, the life of the mother would be endangered if the fetus were carried to term."

On the other hand, we have the federal law known as the Hyde Amendment. The 1994 Hyde Amendment became effective on October 21, 1993. This statute is also known as Pub.L. No. 103-112, § 509 (1993). It provides as follows: "None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother *or that the pregnancy is the result of an act of rape or incest.*" (Emphasis added) The Hyde Amendment dates back to 1976. Each year since 1976, Congress has added some version of the Hyde Amendment to annual appropriations bills for the United States Department of Health and Human Services. From 1982 through 1993, the amendment limited federal funding of abortion to those cases when the life of the pregnant woman would be threatened by carrying the pregnancy to term. The current Hyde Amendment expands coverage to include pregnancies caused by rape or incest.

Defendants in this case have taken the position that they need not provide Medicaid funding for abortions that are the result of rape or incest. This Court disagrees.

First, the statute which enables the Montana Department of Social and Rehabilitation Services to enact administrative

regulations, such as the one here in question (ARM 46.12.2002) provides that the Department may: "make rules *consistent with federal and state law* establishing the amount, scope, and duration of services provided to recipients of public assistance." Section 53-2-201(2)(c), MCA. (Emphasis added) Clearly, Montana's administrative regulation is not consistent with the Hyde Amendment, which is the existing federal law on the subject.

At the hearing held at this matter, the Court was made aware of numerous federal decisions that have been rendered on this issue. Defendants' attorney was asked if he was aware of any state or federal decision to the contrary. No such case was provided to this Court.

The federal decisions are basically to the effect that a state's Medicare funding program cannot be more restrictive than the Hyde Amendment. A case almost identical to the present case is *Roe v. Casey*, 623 F.2d 829 (3rd Cir. 1980). The *Roe* case dealt with a Pennsylvania statute which prohibited Pennsylvania from making reimbursement for any abortion except where the abortion is certified in writing by a physician to be necessary to save the life of the mother. The Pennsylvania statute, thus, was nearly identical to the Montana administrative regulation here in dispute.

The version of the Hyde Amendment with which the *Roe* court was dealing was almost identical to the one with which we are here involved. At that time, the Hyde Amendment provided that no federal funds were to be used to perform abortions except where the life of the mother would be endangered or except for such medical procedures necessary for victims of rape or incest. *Roe* at 834. In striking down the Pennsylvania law, the Third Circuit held that the Hyde Amendment modified Title XIX of the Social Security Act to require states to fund, through Medicaid, abortions in two categories: where the life of the mother was endangered and where the pregnancy was a result of rape or incest. Since the Pennsylvania statutes were not consistent with the then existing Hyde Amendment, they could not stand. *Roe* at 836-37.

A similar result was reached in the recently decided case of *Hern v. Bye*, No. 93-N-2350, 1994 WL 192366 (D.Colo. May 12, 1994). In that case, the federal court struck down a portion of the Colorado Constitution and a portion of Colorado's statutes. Again, the Colorado provisions were narrower than the Hyde Amendment. The federal district court of Colorado struck down the Colorado provisions as being violative of the United States Constitution's Supremacy Clause which provides: "The Constitution, and *the laws of the United States* which shall be made in pursuance thereof; . . . *shall be the supreme law of the land*; and the judges of every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." Constitution of the United States, Article VI(2).[1] (Emphasis added)

The result reached by this Court was clearly within the contemplation of anti-abortion forces in the United States Congress. In testifying on the present provision of the Hyde Amendment, Senator Orin Hatch stated: "If federal funding of abortion is mandated through Medicaid, every state will be required to provide matching funds for abortion on demand." 139 Cong.Rec. 12,581 (September 28, 1993). Further, Senator Don Nickles asserted: "If we have this as a federal government policy for the federal government to pay for abortion, the states likewise have to match those funds . . . there are no state options. The states have to match the federal funds." 139 Cong.Rec. 12,588 (September 28, 1993).

Clearly, Congress contemplated the very result being advocated by Plaintiffs in this aciton.

Further, evidence of the federal intent in this regard are Exhibits D, E, and F attached to Plaintiffs' complaint. Those documents are letters from the Health Care Financing Administration arm of the Department of Health and Human

[1]It should here be noted that on May 31, 1994, the United States Court of Appeals from the Tenth Circuit refused to stay the district court's judgment permanently enjoining enforcement of the Colorado constitutional and statutory provisions in question.

Services, dated December 28, 1993, January 5, 1994, and March 25, 1994. These letters evidence a clear federal intent that the Hyde Amendment requires state Medicaid programs to fund abortions caused by rape or incest.

The Montana Administrative Regulation is in violation of its own enabling statute, Section 53-2-201(2)(c), MCA, and with the Supremacy Clause of the United States Constitution. As such, it cannot stand.

It should be noted that at the hearing of this matter, Plaintiffs provided the professional medical testimony of two licensed physicians in the state of Montana. Both indicated that any delay in obtaining an abortion when one had been decided upon by a woman was detrimental to the woman's emotional and physical health. Thus, the Court has uncontradicted professional testimony that any delay in implementation of this order could cause serious and/or irreparable injury to Medicaid eligible women who are pregnant as a result of rape or incest. That, coupled with the Court's conclusion that Plaintiffs have a good chance of succeeding on the merits of the case, gives rise to the conclusion of this Court that the state of Montana should be enjoined during the pendency of this action from restricting Medicaid reimbursement for abortions in a manner that is inconsistent with Pub.L. No. 103-112, § 509 (1993) (the 1994 Hyde Amendment).

The State has suggested, in its brief filed with the Court, that if this Court reaches the conclusion it has, that the State should still be allowed to determine whether abortion in any specific case is medically necessary as defined by state regulations. This Court is in no way changing or altering existing state regulations or statutes that deal with the medical necessity of abortions in any particular case. Rather, this Court is merely stating that the state of Montana cannot have a Medicaid reimbursement formula that is more restrictive than the formula provided by the federal government.

In conclusion, this Court needs to remind all parties concerned that any decision in a case like this is fraught with

emotion and turmoil. This Court's function is to follow the law of this state and of the United States, regardless of whether this is an abortion case or a case involving some less controversial subject. If the state of Montana does not wish to follow the federal mandate concerning Medicaid funding of abortion, it need not accept federal Medicaid funds. If Montana uses federal Medicaid funds, it must follow the federal law.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants are hereby enjoined, during the pendency of this action, from enforcing ARM 46.12.2002(1)(e) in a manner inconsistent with the 1994 Hyde Amendment, Pub.L. No. 103-112, § 509 (1993).

DATED this 1st day of June, 1994.

/s/ Jeffrey M. Sherlock
DISTRICT COURT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK FAMILY PLANNING SERVICES, P.A.; CURTIS E. STOVER, M.D.; FAYETTEVILLE WOMEN'S CLINIC; AND TOM TVEDTEN, M.D., on behalf of themselves and the Medicaid-eligible women of the state of Arkansas to whom they provide health care — *PLAINTIFFS*

vs. No. LR-C-93-803

THOMAS DALTON, Director of the Arkansas Department of Human Services, in his official capacity; KENNY WHITLOCK, Deputy Director of the Arkansas Division of Economic and Medical Services, in his official capacity; and JIM GUY TUCKER, Governor of the State of Arkansas, in his official capacity, and their successors — *DEFENDANTS*

ORDER

For the reasons stated by the Court at the hearing during the noon hour today, defendants-appellants' motion for a stay is denied.

All of the previous court decisions (at least seven) and the legislative history as revealed by the *Congressional Record* reflect that the 1994 Hyde Amendment intended that Medicaid fund abortions for rape and incest as well as to save the mother's life. The Court has been able to find no precedent to the contrary, and none has been cited by appellants-defendants.

It is important to note that the Hyde Amendment was sponsored by Representative Henry Hyde of Illinois and others

who opposed abortions for any reason except to save the mother's life. The *Congressional Record* reflects that they sponsored this Amendment to avert even broader funding of abortions with Medicaid funds.

Furthermore, the record makes it absolutely clear that these sponsors knew that their Amendment would require the states to either opt out of Medicaid, or provide funding for abortions following rape or incest — as well as for saving the life of the mother. There is not a suggestion to the contrary in the *Congressional Record* as far as the Court can find — and the parties have not called the Court's attention to any such suggestion.

Amendment 68 to the Arkansas Constitution directly conflicts with federal law (the 1994 Hyde Amendment) and is, therefore, null, void and of no effect.[1]

IT IS SO ORDERED this 27th day of July, 1994.

/s/ United States District Judge

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[1]The Court apologizes for the redundancy, but, apparently the Court's 35-page order rendered Monday, last, did not make this point clear.

No. 95-1025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS DALTON, Director of the Arkansas Department of Human Services, in his official capacity; KENNY WHITLOCK, Deputy Director of the Arkansas Division of Economic and Medical Services, in his official capacity; JIM GUY TUCKER, Governor of the State of Arkansas, in his official capacity, and their successors,

Petitioners,

—v.—

LITTLE ROCK FAMILY PLANNING SERVICES, P.A.; CURTIS E. STOVER, M.D.; FAYETTEVILLE WOMEN'S CLINIC; TOM TVEDTEN, M.D., on behalf of themselves and the Medicaid eligible women of the State of Arkansas to whom they provide health care,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

Whether, as the six federal courts of appeal to reach this issue have uniformly held, states that participate in the federal Medicaid program must cover all medically necessary abortions for Medicaid-eligible women for which federal funding is not proscribed.

Whether the lower court correctly declined to rewrite Arkansas Amendment 68 to remedy its inconsistency with federal law on the ground that to do so would have involved the court in legislating which is beyond its judicial role.

PARTIES TO THE PROCEEDING

Respondents are Little Rock Family Planning Services, P.A., Curtis E. Stover, M.D., Fayetteville Women's Clinic, and Tom Tvedten, M.D., on behalf of themselves and their patients.

Drs. Stover and Tvedten are individuals. Little Rock Family Planning Services, P.A., and Fayetteville Women's Clinic, Inc. are sole-shareholder corporations, with no parent or subsidiary companies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Constitutional Provisions, Statutes, and Regulations:

Other:

Respondents Little Rock Family Planning Services, P.A., *et al.* oppose the Petition for Writ of Certiorari, dated December 21, 1995, by petitioners Thomas Dalton, Director of the Arkansas Department of Human Services, Kenny Whitlock, Deputy Director of the Arkansas Division of Economic and Medical Services, Jim Guy Tucker, Governor of the State of Arkansas (together "petitioners"). Petitioners seek review of a decision of the United States Court of Appeals for the Eighth Circuit, issued July 25, 1995, affirming the judgment of the United States District Court for the Eastern District of Arkansas entered on July 25, 1994. The opinion of the court of appeals is reported at 60 F.3d 497 (8th Cir. 1995). *See* B-1.[1] The court of appeals consolidated the instant case with the nearly identical appeal from the United States District Court for the District of Nebraska in *Orr v. Nelson*, No. 4:CV94-3252, slip op. (D. Neb. Nov. 4, 1994). The district court's opinion is reported at 860 F. Supp. 609 (E.D. Ark. 1994). *See* C-1. A petition for certiorari by the defendants in *Orr v. Nelson* is now pending before this Court. *See Orr v. Nelson*, 60 F.3d 497 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3380 (U.S. Nov. 14, 1995) (No. 95-766).

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or

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[1]Citations to the Appendix to the Petition for Certiorari are in the form "A-__"; those to the Appendix to this Brief are in the form "__a."

> which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994), provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. § 1396a(a)(10)(A) (1994) provides:

> A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title . . . .

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) provide in relevant part:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital

> services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

COUNTERSTATEMENT OF THE CASE

On October 21, 1993, President Clinton signed into law the fiscal year 1994 appropriations bill for the Departments of Labor, Health and Human Services and Education, which includes the 1994 version of the "Hyde Amendment," an annual rider prohibiting federal reimbursement for abortions except in a narrow range of circumstances. *See* Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993). The 1994 Hyde Amendment, which appropriated federal funds for abortions necessary to save the life of the pregnant woman or when the pregnancy resulted from an act of rape or incest, marked a significant expansion in federal funding for abortion services. Between 1981 and 1993, the annual Hyde Amendment appropriated federal Medicaid funds for abortion services only when the pregnant woman's life was at risk. Despite vigorous attempts in Congress to amend it,[2] the 1995 Hyde Amendment is identical to the 1994 Hyde Amendment. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

This case was commenced on November 8, 1993, seeking declaratory and injunctive relief barring enforcement

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[2]*See* note 4, *infra*.

of Amendment 68 of the Arkansas Constitution, and the provisions of the Arkansas state plan that relate to abortion funding (together, the "challenged provisions"), for so long as Arkansas receives federal Medicaid funding. The challenged provisions would deny Arkansas Medicaid recipients coverage for abortions except when necessary to save a pregnant woman's life. Respondents claimed that, pursuant to the Supremacy Clause of the United States Constitution, the challenged provisions must be enjoined because they directly conflict with federal law which, as of the outset of the 1994 federal fiscal year, mandates Medicaid coverage for abortions for rape and incest victims.

On July 25, 1994, the district court granted respondents' motion for summary judgment, ruling that Amendment 68 contravenes the Supremacy Clause of the U.S. Constitution because it conflicts with federal law, which -- as of October 1, 1993 -- requires state Medicaid programs to pay for abortions for pregnant rape and incest victims, as well as women whose lives are threatened by the pregnancy. The district court also concluded that it could not cure Amendment 68's invalidity by writing in additional exceptions for rape and incest victims because doing so would "involve th[e] Court in positive legislative enactment clearly beyond the scope of its judicial role." *Valley Family Planning v. State of North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981). Finally, the district court held that all three sections of Amendment 68 must be permanently enjoined as a result of the invalidity of the public funding ban because that section is the "core" provision of Amendment 68, *Handy Dan Improvement Ctr. v. Adams*, 633 S.W.2d 699 (Ark. 1982), and was the "bait" that enticed voters to vote for the Amendment. *United States Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994), *aff'd on other grounds*, 115 S. Ct. 1842 (1995). *See* C-1.

Immediately after the district court's judgment was issued, petitioners sought a stay of the judgment pending appeal. The district court denied this motion and in so doing reaffirmed that Amendment 68 is "null, void and of no effect." *See* D-1.

On July 26, 1994, petitioners filed a Notice of Appeal of the district court's judgment. The United States Court of Appeals for the Eighth Circuit consolidated this appeal with the appeal in *Orr v. Nelson*. On July 25, 1995, the United States Court of Appeals for the Eighth Circuit affirmed the district court in all respects. The ruling was unanimous with respect to the district court's ruling that the Arkansas Medicaid program must cover abortions for low-income rape and incest victims for so long as it participates in the Medicaid program. *See* B-1. One judge dissented with respect to the district court's decision not to rewrite Amendment 68 to cure its invalidity. *Id.* Arkansas's petition for rehearing was denied on September 22, 1995. *See* A-1.

REASONS FOR DENYING THE WRIT

Petitioners' request for a writ of certiorari must be denied because they have failed to establish any of the factors that weigh in favor of granting the petition. Petitioners do not claim that the decision of the court of appeals is "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Nor could they. Indeed, the decision of the court below is in complete harmony with the decisions of the United States courts of appeals for the First, Third, Fifth, Seventh and Tenth Circuits, as well as six recent decisions of United States district courts that have not been appealed or in which appellate rulings have not yet been rendered. On this issue, which has been litigated

extensively in the federal courts over the last fifteen years, there is no standing contrary precedent.

Petitioners argue that the petition should be granted because the court below "decided an important question of federal law which has not been, but should be, settled by this Court," Sup. Ct. R. 10.1(c), and "to correct the judicial overreaching" of the lower court. Pet. at 10. Petitioners are incorrect on both counts. First, petitioners misinterpret this Court's ruling in *Harris v. McRae*, 448 U.S. 297 (1980), which strongly supports the result reached by the lower court. Second, petitioners err in characterizing the lower court's decision not to redraft a state constitutional amendment as "judicial overreaching." The lower court's decision was the essence of judicial restraint; judicial overreaching would occur if -- as petitioners urge -- a federal court engaged in legislating by redrafting a state constitutional provision to remedy its inconsistency with federal law.

Moreover, because the lower federal courts have reached a uniform result in the numerous cases addressing the precise issue raised here, and this Court has already denied a writ of certiorari in three of those cases, there is no compelling reason for this Court to use its limited resources to review this matter. The petition must therefore be denied.

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED

The lower court's decision ordering the Arkansas medical assistance program (so long as it participates in the

federal Medicaid program) to cover abortions for rape and incest victims for so long as federal funding is not proscribed for such procedures, is in complete accord with every standing decision of the federal appellate and district courts to decide this question. *See Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995), *reh'g denied*, No. 94-30445, 1995 LEXIS U.S. App. 33214 (5th Cir. Oct. 17, 1995); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 177 (3d Cir. 1995), *reh'g en banc denied*, No. 94-1954 (3d Cir. Aug. 24, 1995), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-820);[3] *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980); *Reproductive Health Services v. Freeman*, 614 F.2d 585, 596 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Hodgson v. Board of County Comm'rs, County of Hennepin*, 614 F.2d 601, 605 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Utah Women's Clinic, Inc. v. Graham*, 892 F. Supp. 1379, 1384 (D. Utah 1995); *Fargo Women's Health Org. Inc. v. Wessman*, No. A3-94-36, slip op. at 25 (D.N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995); *Stangler v. Shalala*, No. 94-4221-CV-C-5, slip op. at 11 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *3 (N.D. Ill. Dec. 6, 1994); *Planned Parenthood Affiliates of Michigan v.*

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[3] In their petition for certiorari, the petitioners in *Blackwell* do not contest "that States are required to fund those abortions for which federal reimbursement is available under the Hyde Amendment." Petition for Certiorari at 10, *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995) (No. 95-820); *id.* at 10 n.6 (noting that petitioners do not raise this issue).

Engler, 860 F. Supp. 406, 410 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan. 20, 1995), *appeal and cross-appeal pending*, Nos. 94-1913 & 94-2097 (6th Cir. argued Oct. 13, 1995); *Planned Parenthood of Missoula Inc. v. Blouke*, 858 F. Supp. 137, 142 (D. Mont. 1994); *see also Hope v. Childers*, No. 3:95CV-518-S (W.D. Ky. July 28, 1995) (order granting preliminary injunction); *Jeanette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) (annexed as an Appendix to the district court's opinion in *Little Rock Family Planning Services, P.A. v. Dalton*, 860 F. Supp. 609, 628 (E.D. Ark. 1994)) (state court preliminary injunction prohibiting Montana from denying Medicaid coverage for abortions for rape and incest victims).

In three of these cases -- *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) -- this Court denied petitions for certiorari. Indeed, in denying an application for a stay pending appeal in *Hope Medical Group for Women v. Edwards*, 115 S. Ct. 1 (1994) (Scalia, Circuit Justice), Justice Scalia recognized that:

> [t]he Courts of Appeals to address th[e] question [of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment] have uniformly supported that premise . . . . We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless

> and until a conflict in the Circuits appears.

115 S. Ct. at 2 (citations omitted). No conflicts in the Circuits having appeared, this Court should follow Justice Scalia's well-grounded reasoning and deny this petition.

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION

Not only have the lower federal courts been uniform in their treatment of the question presented for review, the result they have reached is supported by the structure of the federal Medicaid Act, this Court's decision in *Harris v. McRae*, and the guidance of the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services ("HHS"), which is charged with overseeing the federal Medicaid program.

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court

The federal Medicaid program (established pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u (1994)) is a federal-state cooperative program that enables participating states, with the aid of federal funds, to provide medical services to needy individuals. "Although participation in [Medicaid] is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Virginia Hospital Ass'n*, 496

U.S. 498, 502 (1990).

Under Title XIX, certain categories of medical care are "mandatory," and must be provided by every state Medicaid program. *See* 42 U.S.C. § 1396a(a)(10)(A) ("A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of section 1396d(a) of this title."). The mandatory categories of care include:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

42 U.S.C. §§ 1396d(a)(1)-(5). A state plan must cover medical services that fall within the mandatory categories of care which an individual's physician certifies as "medically necessary." *See Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (Medicaid must cover medically necessary AZT treatments); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (Medicaid must cover medically necessary sex reassignment surgery); *Allen v. Mansour*, 681 F. Supp. 1232, 1237-38 (E.D. Mich. 1986) (Medicaid must cover medically necessary liver transplant surgery), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. Mar. 19, 1991).

Because abortion falls within several of the categories

of mandatory covered services identified in 42 U.S.C. § 1396d(a) -- "family planning services," "physicians' services," "outpatient hospital services," "inpatient hospital services" -- between 1973 and 1976, state Medicaid programs were required to cover medically necessary abortions. As the Court of Appeals for the Eighth Circuit held in *Hodgson*, "[w]e think it plain that [Medicaid's mandatory services] include medical procedures to induce abortions." 614 F.2d at 607. *See also Doe v. Busbee*, 481 F. Supp. 46, 49 (N.D. Ga. 1979) ("[a]bortion is a medical service which falls within one or more of the five categories of medical service which must, as a minimum, be provided under a state's plan for medical assistance"); *Emma G. v. Edwards*, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (state of Louisiana stipulated that medically necessary abortions were covered under Title XIX); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83, 1086 (D.N.H. 1976) (medically necessary abortions are a covered service under Medicaid); *Dodge v. Department of Social Services*, 657 P.2d 969, 974 (Colo. Ct. App. 1982) ("abortion is a medical procedure . . . . When performed by physicians, this medical procedure necessarily involves physician services. It may also involve inpatient or outpatient hospital services, or both, as well as other statutorily defined categories of authorized medical services in some circumstances").

In 1976, Congress passed what is commonly called the Hyde Amendment, which prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary. Each year since 1976, Congress has added a "Hyde Amendment" to annual appropriations bills for the U.S. Department of Health and Human Services. The circumstances in which federal funds have been appropriated for low-income women's abortions have varied. Between fiscal years 1982 and 1993, the Hyde Amendment limited federal funding for abortions to

situations where the life of the pregnant woman would be threatened by carrying the pregnancy to term.[4]

In 1980, in *Harris v. McRae*, this Court upheld, against statutory and constitutional challenge, congressional restrictions on federal funding of abortion services for the poor. *McRae* directly supports the result reached by the lower court here. In challenging the Hyde Amendment, the plaintiffs in *McRae* argued that despite the withdrawal of federal funds for non-lifesaving abortions, state Medicaid programs continued to be obligated under Title XIX to cover all medically necessary abortions, even if they had to pay for the procedures entirely with state funds. *See McRae*, 448 U.S. at 307-08 ("[i]t is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating State of its duty under Title XIX to provide for such abortions in its

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[4]For several years the Hyde Amendment contained a proviso explicitly giving state Medicaid programs the option not to cover even those abortions for which federal funding was available. The provision stated: "Provided, however, That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." *See* Pub. L. No. 96-369, § 101(c), 94 Stat. 1352, 1353 (1980); Pub. L. No. 96-536, § 109, 94 Stat. 3166, 3170 (1980); Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14, 95-96 (1981); Pub. L. No. 97-377, § 204, 96 Stat. 1830, 1894 (1982). This "state-option" proviso to the Hyde Amendment has not been enacted since 1982, although it was proposed and rejected in 1995. *See* Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 (discussing amendment added by House Appropriations Committee to budget rescissions bill, which would have given states the option of not covering Medicaid abortions for rape and incest victims); David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 (reporting that the "state option" Medicaid abortion provision had been eliminated from the rescissions bill).

Medicaid plan"). This Court rejected that argument, holding that Congress "did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan." *Id.*, at 309. It stated: "Title XIX does not require a participating State to pay for *those* medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." *Id.*, at 311 (emphasis added).

The plain implication of this Court's holding in *McRae* is that Title XIX requires states to cover those medically necessary abortions for which the funding obligation is not "unilateral," 448 U.S. at 309, and for which federal reimbursement *is* available under the Hyde Amendment. In other words, to the extent that federal funding for medically necessary abortions is not proscribed by the Hyde Amendment, participating states are obligated to continue covering medically necessary abortions, as they did before the Hyde Amendment was enacted.

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision

Concurring with this analysis, on December 28, 1993, the director of the Medicaid Bureau of HCFA advised state Medicaid directors that, effective October 1, 1993, all state medical assistance plans must cover abortions for which federal funds are appropriated under the current Hyde Amendment (the "HCFA Directive"). *See* 1a. In relevant part, the HCFA Directive provides:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to

> save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided . . . . [W]e believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

2a. HCFA's interpretation of participating states' obligations under the Hyde Amendment and Title XIX is entitled to substantial deference by this Court. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (reasonable agency determination must be accorded "considerable weight").

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined

The Supremacy Clause, Article VI, clause 2 of the United States Constitution, requires invalidation of any state constitutional or statutory provision that conflicts with federal law. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338,

346-47 (1975) (New York regulations reducing shelter allowance to AFDC recipients are invalid because they conflict with Title XIX and federal regulations). Because Title XIX and the 1994 and 1995 Hyde Amendments, when read together, mandate coverage of abortions for low-income rape and incest victims -- which the challenged provisions prohibit -- the Supremacy Clause requires invalidation of the challenged provisions; this is precisely what the lower court here held.

III. THE LOWER COURT CORRECTLY DECLINED TO REWRITE AMENDMENT 68

The lower court correctly found that the "district court did not err in invalidating the entire Arkansas state constitutional amendment and in declining to rewrite the amendment to cure the validity." See B-12. As the court explained, "[r]edrafting the amendment or writing in exceptions in order to cure the invalidity presented by the plain meaning of its language would have involved the district court in "'positive legislative enactment clearly beyond its judicial role.'" *See* B-12 (quoting *Valley Family Planning*, 661 F.2d at 102).

The lower court's decision is entirely consistent with several of this Court's decisions. For example, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), this Court held that the Oklahoma Habitual Criminal Sterilization Act violated the Equal Protection Clause because revenue act offenses such as embezzlement were not punishable by sterilization, whereas similar crimes were. The Court, however, refused to rewrite the law to expand its coverage to embezzlers, instead leaving it to Oklahoma to decide whether to so expand the law's coverage. *Id.* at 543. Likewise, in *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court

struck down Maryland's motion picture censorship statute because it did not provide adequate safeguards against inhibition of speech, but refused to rewrite the statute concluding that "[h]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." *Id.* at 60. *See also Chapman v. United States*, 500 U.S. 453, 464 (1991) (statutory canons admonishing courts to avoid unconstitutional statutory constructions, are "not a license for the judiciary to rewrite language enacted by the legislature") (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements").

The lower court's decision is also consistent with other lower court precedent. For example, in *Valley Family Planning*, the Court of Appeals for the Eighth Circuit invalidated a North Dakota statute that restricted state and local funding for any agency that performs, refers, or encourages abortion because the prohibition conflicted with Title X of the federal Public Health Service Act, which requires grantees to make referrals for abortion when the pregnant woman's life is at risk. Precisely as it did in the instant case, the court of appeals refused to rewrite the North Dakota statute to add an exception for abortion referrals for life-threatening pregnancies or to delete the ban on referrals while leaving the ban on performing or encouraging abortions intact. Rather, it held:

> We are not inclined to cure the invalidity of [the impermissible statute] by writing in exceptions to its referral prohibition; that would involve this Court in positive legislative enactment *clearly beyond its judicial role*.

Valley Family Planning, 661 F.2d at 102 (emphasis added) (citation omitted).

The lower court's ruling is also supported by the decision of the Court of Appeals for the Third Circuit in *Roe v. Casey*, 623 F.2d 829, 837 (3d Cir. 1980), that it could not rewrite a Pennsylvania Medicaid abortion restriction to bring it into compliance with federal law. The Third Circuit explained:

> [t]here is nothing in the record to indicate what course Pennsylvania would choose to follow given the amendment to Title XIX by the Hyde enactment and we are not free to substitute our speculation for the judgment of the duly constituted officials of the state. *This court should refrain from acting on a "matter which properly requires the exercise of policy judgment by the legislature."*

623 F.2d at 837-38 (emphasis added) (citation omitted).

Underlying the well-established prohibition on judicial rewriting are the principles of comity and federalism that counsel federal courts to respect state sovereignty when fashioning equitable remedies with respect to invalid state laws. In *Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991), for example, the Court of Appeals for the Sixth Circuit reversed a district court's attempt to rewrite a Kentucky parental consent abortion statute to save it from unconstitutional vagueness, holding that the district court could "not supply new limiting language for a state statute to create constitutionality." *Id.*, 937 F.2d at 1120. Explaining its conclusion, the Sixth Circuit held: "the general federal rule is that courts do not rewrite statutes to

create constitutionality." 937 F.2d at 1122. It further explained:

> In this case we must weigh both the need to keep legislative and judicial power separate and the need to respect state judicial policy regarding revision of state statutes. In applying the doctrine of judicial review, our jurisprudence in this area of interpretation stresses both separation of powers and federalism concerns. . . .
>
> . . .
>
> [i]t is not the province of the court to . . . amend an invalid state statute, and the citizens of a state should not be required to look to federal court decisions to determine the language of the statute or amendments to it. . . .
>
> . . .
>
> We conclude that while a federal court may enjoin the operation of some provisions of state statute and leave others to operate, it cannot itself draft a new limiting condition, thus reframing the statute.

Id., 937 F.2d at 1127-28.

Rewriting is particularly inappropriate where, as here, a constitutional amendment passed by voter initiative is at issue, *see Faubus v. Kinney*, 389 S.W.2d 887, 892 (Ark. 1965) (in fashioning relief when part of a constitutional amendment is invalid, the "intent of the people is controlling"), and there are numerous ways to conform state

and federal laws.[5] The district court correctly held that:

> The Court has no way of knowing how the people will resolve these detailed questions. . . .
>
> The people of Arkansas may choose to opt out of the Medicaid program entirely, or they may choose to adopt an expanded version of Amendment 68. Arkansas voters may extend coverage for medically necessary abortions to cases where there are fetal anomalies or where the woman's health would incur serious damage, or alternatively, they may choose to confine the state to the minimum provisions that

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[5]As the district court correctly noted:

> It is not possible for this Court to divine all the details involved regarding how Arkansas would wish to [conform Amendment 68 to federal law], for the extension of coverage raises several issues. Plaintiff[s] point[] out that the relevant issues would include: whether Medicaid coverage would be based upon a reporting or documenting of the rape or incest; whether there would be a time limit on the reporting requirement; to whom would the report be addressed; would the confidentiality of the reporting woman or girl be protected; would the burden of reporting be on the woman or girl, or her doctor; would the victim have to name the perpetrator in the report; would waivers of the reporting requirement be authorized; and how would rape and incest be defined for purposes of Medicaid reimbursement.

C-25-26.

must be covered, as mandated in the Hyde Amendment. This Court takes no position, of course, on any of these questions, and cannot know how the voters will choose to respond to the situation created by Amendment 68's conflict with federal law. Pursuant to its appropriate judicial role, the Court concludes that the Amendment must be stricken in its entirety, to enable the people or their elected representatives to decide how Arkansas will cover abortion in the state Medicaid program so that it will not conflict with federal law.

C-26.

In addition, Amendment 68, Section 3's mandate that the provision will "not . . . require an appropriation of public funds" is further reason that Section 1 cannot be rewritten to conform it to federal requirements. As petitioners admitted during this litigation, providing abortion coverage for rape and incest victims would require an appropriation of public funds. Thus, rewriting Amendment 68, Section 1 to bring it into compliance with federal law would violate Amendment 68, Section 3. Averting conundrums such as this is precisely why federal courts should refrain from rewriting state constitutional provisions. As this Court held in *Freedman v. Maryland*, "[h]ow or whether [Arkansas] is to incorporate the required [funding for abortions for rape and incest victims] is, of course, for the State to decide." *Id.*, 380 U.S. at 60.

CONCLUSION

Although this Court has not squarely ruled on whether state Medicaid programs must cover all abortions for which

federal funds are available, there is no reason for it to use its limited resources to do so. The lower court's ruling is in harmony with every standing federal decision on this issue, is supported by this Court's prior related decision in *Harris v. McRae*, as well as by the federal Medicaid Act and the HCFA Directive. Likewise, this Court should not use its limited resources to review the lower court's restrained decision not to rewrite a state constitutional amendment to bring it into compliance with federal law, precisely as this Court has done on several occasions. For the reasons stated herein, the petition for a writ of certiorari must be denied.

Dated: January 5, 1996

Respectfully submitted,

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APPENDIX

Letter from Sally K. Richardson, Director, Medicaid Bureau, Health Care Financing Administration, United States Department of Health and Human Services to State Medicaid Directors

December 28, 1993

Dear State Medicaid Director:

The purpose of this letter is to notify you about a recent Congressionally enacted revision to the "Hyde Amendment" which affects the Medicaid program and to tell you how this revision in the law is to be implemented.

Effective October 1, 1993, as part of P.L. 103-112, the Health and Human Services Appropriation bill, Congress passed a revision of the Hyde Amendment pertaining to Federal funding of abortions under the Medicaid program. As enacted, the provision states:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Thus, Federal funding (FFP) is now available for abortions performed to save the life of the mother or to terminate pregnancies resulting from rape or incest when the claim for such an abortion is paid by the State on or after October 1, 1993. Please note that it is the date that the State pays the claim and not the date of the service which determines the availability of FFP.

In order to implement this provision of the law, we are requesting that beginning with the first Quarterly Expenditure Report (HCFA-64) for fiscal year (FY) 1994 in January, States submit to the Health Care Financing Administration (HCFA) regional office (RO) a form certifying the number of abortions performed to save

the life of the mother, the number performed for a pregnancy resulting from an act of rape, and the number performed for a pregnancy resulting from an act of incest. This certification should be submitted to the RO on a quarterly basis with the completed HCFA-64.

Current regulations at 42 CFR 441.203 and 441.206 require that before FFP can be made available, the State must obtain a signed physician's certification that, based on the professional judgment of the physician, the abortion was necessary because "the life of the mother would be endangered if the fetus were carried to term." Because the language of the current Hyde Amendment differs somewhat from its predecessors, the State must change the wording of the physician's certification to comport with the current statutory language. With regard to this portion of the Hyde Amendment, the new legislative language, "to save the life of the mother," has essentially the same meaning as the previous legislation.

As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

The definition of rape and incest should be determined in accordance with each State's own law. States may impose reasonable reporting or documentation requirements on recipients

or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies resulted from rape or incest. To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement.

State which have State Plan language more restrictive than that provided for under the revised Hyde Amendment may qualify for Federal funding for the first quarter of FY 94 if they submit approvable State Plan language changes by December 31, 1993.

By March 31, 1994, all States must ensure that their State Plans do not contain language that precludes FFP for abortions that are performed to save the life of the mother or to terminate pregnancies result from rape or incest.

As you know, it is necessary for States to adhere to all conditions for Federal Medicaid funding. As part of its ongoing State assessment and audit programs, HCFA may include reviews of abortion claims, if necessary, to assure compliance with these conditions.

Please call my office if you have any questions about this matter.

Sincerely yours,
/s/ SALLY K. RICHARDSON
Sally K. Richardson
Director
Medicaid Bureau

cc: All Regional Administrators

SUPREME COURT OF THE UNITED STATES

THOMAS DALTON, DIRECTOR, ARKANSAS DEPARTMENT OF HUMAN SERVICES ET AL. *v.* LITTLE ROCK FAMILY PLANNING SERVICES ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95–1025. Decided March 18, 1996

PER CURIAM.

Respondents in this case are Medicaid providers and physicians who perform abortions in the State of Arkansas. In November 1993, they filed suit against petitioners, who are Arkansas state officials, seeking injunctive and declaratory relief with respect to Amendment 68 of the Arkansas Constitution, §1 of which prohibits the use of state funds to pay for any abortion "except to save the mother's life." Their claim was that this provision is inconsistent with a requirement in Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U. S. C. §1396 *et seq.*, as affected by the 1994 version of the "Hyde Amendment," that States fund medically necessary abortions where the pregnancy resulted from an act of rape or incest.[1] The United

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[1]The 1994 Hyde Amendment, so named for its sponsor, Representative Henry Hyde of Illinois, was enacted as §509 of the Department of Labor Appropriations Act, 1994, 107 Stat. 1082. Section 509 directs that "[n]one of the funds appropriated under this Act shall be expended for any abortion except when it is made known to

States District Court for the Eastern District of Arkansas granted summary judgment for respondents and enjoined Amendment 68; the United States Court of Appeals for the Eighth Circuit affirmed. 60 F. 3d 497 (1995). Petitioners sought certiorari with respect to two aspects of the case: (1) the District Court's holding that "[u]nder the Hyde Amendment . . . federal law requires Arkansas and other states that participate in the federal Medicaid program to pay for abortions in cases where pregnancy is the result of rape or incest, as well as abortions to save the mother's life," 860 F. Supp. 609, 612 (1994), and (2) the District Court's enjoining of Amendment 68 "*in its entirety* for so long as the State of Arkansas accepts federal funds pursuant to the Medicaid Act," *id.*, at 628 (emphasis added).[2] We grant certiorari as to the second of these questions. Accepting (without deciding) that the District Court's interpretation of the Hyde Amendment is correct, we reverse the decision below insofar as it affirms blanket invalidation of Amendment 68.

In a pre-emption case such as this, state law is displaced only "to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 204 (1983). See, *e.g.*, *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 109 (1992); *Exxon Corp.* v. *Hunt*, 475 U. S. 355, 376 (1986). "[T]he rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 502 (1985).

Amendment 68 reads as follows:

> "§1. Public funding. No public funds will be used to pay for any abortion, except to save the mother's life.
>
> "§2. Public policy. The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.
>
> "§3. Effect of amendment. This amendment will not affect contraceptives or require an appropriation of public funds."

Section 1 of this provision is affected by the lower courts' interpretation of Title XIX and the 1994 Hyde Amendment only in cases where a Medicaid-eligible woman seeks to abort a pregnancy resulting from an act of rape or incest and the abortion is not necessary to save the woman's life. Respondents do not claim that any other possible application of §1 is pre-empted by current federal law. It is entirely possible, for example, that §1 would have application to state programs that receive no federal funding. As the District Court noted, the Arkansas Crime Victims Reparations Act, Ark. Code Ann. §16–90–701 *et seq.* (Supp. 1995), established a program which provides compensation and assistance to victims of criminal acts within the State, including compensation for medical expenses, see §16–90–703(7). Without the limitation imposed by Amendment 68, the program might have the authority to reimburse crime victims for abortions not necessary to save the life of the pregnant woman. Assuming the compensation program is entirely state funded, nothing in respondents' challenge to Amendment 68 suggests that the application of

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the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest." 107 Stat. 1113. The provision was reenacted unchanged for fiscal year 1995. See 108 Stat. 2539.

[2]Any uncertainty as to the scope of the District Court's injunction was erased by a subsequent order denying petitioners' motion for stay of judgment. The order declares that "Amendment 68 to the Arkansas Constitution directly conflicts with federal law (the 1994 Hyde Amendment) and is, therefore, null, void and of no effect." App. to Pet. for Cert. D-2. A footnote to this sentence states: "The Court apologizes for the redundancy, but, apparently the Court's 35–page order rendered Monday, last, did not make this point clear." *Ibid.*

§1 to the program would conflict with any federal statute. Because Amendment 68 was challenged only insofar as it conflicted with Title XIX, it was improper to enjoin its application to funding that does not involve the Medicaid program.

The District Court's injunction is overbroad in its temporal scope as well. The Hyde Amendment is not permanent legislation; it was enacted as part of the statute appropriating funds for certain Executive Departments for one fiscal year. While the versions of the Hyde Amendment applicable to the 1994 and 1995 fiscal years authorized the use of federal funds to pay for an abortion after notice "that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest," the version of the amendment applicable to prior years limited federal funding to those abortions necessary to save the life of the mother. See, *e.g.*, §203, Department of Labor Appropriations Act, 1993, 106 Stat. 1811. Because this history identifies the possibility that a different version of the Hyde Amendment may be enacted in the future, it was improper for the District Court to enjoin enforcement of Amendment 68 "for so long as the State of Arkansas accepts federal funds pursuant to the Medicaid Act." 860 F. Supp., at 628. See *Planned Parenthood Affiliates of Michigan* v. *Engler*, 73 F. 3d 634, 641 (CA6 1996) (modifying injunction in similar case to "tak[e] into account the changeable nature of spending bills in general, and the Hyde Amendment in particular, which in some years are very restrictive and in other years are less so").

The District Court's invalidation of §§2 and 3 of the Amendment was based on the proposition that these sections "have no function independent of" §1. 860 F. Supp., at 626. Even assuming that to be true, once §1 is left with the substantial application that the Supremacy Clause fully allows, §§2 and 3 subsist as well.

We therefore reverse the decision of the Eighth Circuit

insofar as it affirms the scope of the injunction, and remand for entry of an order enjoining the enforcement of Amendment 68 only to the extent that the Amendment imposes obligations inconsistent with federal law.

It is so ordered.